CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 360

THE UNITED STATES OF AMERICA, PETITIONER

vs.

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1938
CERTIORARI GRANTED OCTOBER 24, 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 360

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT G. TOWERY, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

[Caption omitted.]

In United States District Court for the Northern District of Illinois, Eastern Division

No. 45443

CHARLES F. TOWERY IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed June 29, 1936

To the District Court of the United States for the Northern District of Illinois, Eastern Division:

The plaintiff complains of the above named defendant and for cause of action alleges:

1. That the plaintiff is a citizen of the United States of America and a resident of the said Northern District of Illinois, Eastern Division, and is now a resident of Chicago, Illinois; that Robert C. Towery enlisted for military service in the United States Army on the 5th day of August A. D. 1917, and was given an honorable discharge therefrom on the 18th day of June A. D. 1919, and died intestate on the 22nd day of April A. D. 1927, at Hines, Illinois; that at the date of his death the said Robert C. Towery was a resident of Christian County, in the State of Illinois; that the said Robert C. Towery left surviving him as his only heirs at law and next of kin the plaintiff Charles F. Towery, his brother, and Mamie Ball, wife of Claude Ball, his half-sister; that afterwards, on, to-wit: the 2nd day of May A. D. 1927, the plaintiff was duly appointed and qualified as administrator of the estate of said Robert C. Towery, deceased, and letters of administration as such were issued to him by
4 the County Court of Christian County, Illinois, and the plaintiff is still acting as such administrator; that the plaintiff in his own right was and is the duly designated beneficiary of the war risk insurance hereinafter mentioned;

2. That while in active service under said enlistment the said Robert C. Towery made application for two policies of war risk insurance in his behalf, and said applications were accepted by the defendant and two policies or certificates of war risk insurance were issued thereon, as the plaintiff is informed and believes, in the amount of Five Thousand Dollars each, and thereafter there was deducted from the monthly pay of the said Robert C. Towery from time to time the usual premiums, to-wit: a total of Seven Dollars per month, in full payment of the money due from the said Robert C. Towery

under the terms of the said policies or certificates, by the terms of which policies or certificates the defendant agreed to pay to the said Robert C. Towery the total sum of, to-wit: Fifty-seven Dollars and Fifty Cents per month in the event of total permanent disability incurred during the life of the said insurance contracts, and in the event of his death to his duly designated beneficiary of said insurance a like sum of money per month until there shall have been paid to such beneficiary a total of two hundred forty of such monthly installments, less the number of such installments, if any, paid to the said Robert C. Towery or his administrator, which policies or certificates of insurance are in words and figures as follows, to-wit:

THE UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C.

Certificate No. 390743

Date Insurance Effective Dec. 5, 1917

This certifies that Robert Clifton Towery has applied for insurance in the amount of $5,000, payable in case of death or total permanent disability in monthly installments of $28.75.

Subject to the payment of the premiums required, this insurance is granted under the authority of an Act amending "An Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.

W. G. McADOO,
Secretary of the Treasury.

WILLIAM C. DELANOY,
Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C.

G. K. MOORE,
Registrar. [SEAL].

Form 711—2-4175

IMPORTANT NOTICE

The insured may change the beneficiary without the consent of such beneficiary. This insurance is not assignable and is not subject to the claims of the creditors of the insured or of the beneficiaries.

Should a claim arise under this certificate you are requested to write direct to the Bureau of War Risk Insurance, Treasury Department, Washington, D. C., in order to secure a prompt settlement. There will be no expenses in connection with proving a claim and collecting the amount due, other than small fees to notaries. It will not be necessary to consult or employ an attorney, claim agent, or other person to secure benefits under this certificate. 2-4175.

THE UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C.

Certificate No. 1437536

Date Insurance Effective Feb. 1, 1918

This certifies that Robert Clifton Towery has applied for insurance in the amount of $5,000, payable in case of death or total permanent disability in monthly installments of $28.75.

Subject to the payment of the premiums required, this insurance is granted under the authority of an Act amending "An Act entitled 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.

W. G. McADOO,
Secretary of the Treasury.

WILLIAM C. DELANOY,
Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C.

A. A CAMPBELL,
Registrar. [SEAL].

Form 711—2-4175

IMPORTANT NOTICE

The insured may change the beneficiary without the consent of such beneficiary. This insurance is not assignable and is not subject to the claims of the creditors of the insured or of the beneficiaries.

6 Should a claim arise under this certificate you are requested to write direct to the Bureau of War Risk Insurance, Treasury Department, Washington, D. C., in order to secure a prompt settlement. There will be no expenses in connection with proving a claim and collecting the amount due, other than small fees to notaries. It will not be necessary to consult or employ an attorney, claim agent, or other person to secure benefits under this certificate. 2-4175.

3. That during the life of the said insurance contracts the said Robert C. Towery became totally and permanently disabled as a result of the following diseases, ailments, and injuries, to-wit: Nephritis; tumor; left kidney, malignant; aortic insufficiency; aortic stenosis; heart trouble; cancer; general weakness; and general disability.

4. That by reason of the matters and things aforesaid the said Robert C. Towery became and was totally and permanently disabled, on, to-wit: the 18th day of June A. D. 1919, and became entitled to receive from the defendant under the terms of the said contracts of insurance the total sum of Fifty-seven Dollars and Fifty Cents per month for each month thereafter;

5. That the plaintiff made due proof of such disability and death to the defendant and demanded payment of the aforesaid amounts, and his said claim remained pending in the United States Veterans' Bureau ever since a date less than five years subsequent to the death of the said Robert C. Towery, to-wit: ever since the 11th day of February A. D. 1932, until the 8th day of August A. D. 1935; nevertheless, the said defendant and its agents in that behalf, the Veterans' Administration, the Board of Veterans' Appeals, and the Administrator of Veterans' Affairs, have disagreed with the plaintiff as to his claim for said disability and have wholly failed and refused to pay the said sums of money, or either thereof, or any part thereof.

Wherefore the plaintiff as such Administrator prays judgment against the defendant in the sum of Five Thousand Four Hundred Sixty-two Dollars and Fifty Cents, being the amount so due him as such Administrator at the rate of Fifty-seven Dollars and Fifty Cents per month, from the 18th day of June A. D. 1919, to and includ-

7 ing the 18th day of April A. D. 1927, and the plaintiff in his own right prays judgment against the defendant in the sum of Six Thousand Three Hundred Eighty-two Dollars and Fifty Cents, being the amount so due him at the rate of Fifty-seven Dollars and Fifty Cents per month from the 22nd day of April A. D. 1927, to and including the 22nd day of June A. D. 1936, and for the sum of Fifty-seven Dollars and Fifty Cents per month for each and every month thereafter.

CHARLES F. TOWERY, *Plaintiff,*
In his own right and as Administrator
of the Estate of Robert C. Towery, deceased.

PHILLIP B. LEVITON,
EDWARD H. S. MARTIN,
Attorneys for Plaintiff.

[*Duly sworn to by Charles F. Towery; jurat omitted in printing.*]

8–10 In United States District Court

[Title omitted.]

Affidavit of service

Filed July 27, 1936

STATE OF ILLINOIS,
County of Cook, ss:

Edward H. S. Martin, being first duly sworn, on his oath deposes and says that on the 29th day of June A. D. 1936, he filed with the clerk of the above entitled court the original petition in the above-entitled cause and served a true and correct copy thereof upon the United States District Attorney for the above named District and mailed a true copy thereof by registered mail to the Attorney General of the United States on the 29th day of June A. D. 1936.

EDWARD H. S. MARTIN.

Subscribed and sworn to before me this 29th day of June A. D. 1936.

_____,
Notary Public.

Received a copy of the petition in the above-entitled cause this 29th day of June A. D. 1936.

M. L. IGOE, P.,
United States District Attorney.

11-12 In United States District Court

[Title omitted.]

Motion to dismiss

Filed Nov. 5, 1937

Comes now the defendant, the United States of America, by its attorneys of record, Michael L. Igoe, United States Attorney, and William M. Lytle, Attorney, Department of Justice, and moves the court that this law suit be dismissed for the reason that it is barred by the Statute of Limitations as provided for in Section 19 of the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, as amended July 3, 1930.

In support of the above motion to dismiss the defendant alleges and offers to prove:

I. That no claim for insurance benefits was received by the Veterans' Administration prior to February 6, 1932.

Wherefore, the defendant prays that the plaintiff's petition be dismissed, that the plaintiff take nothing by this action, that judgment be entered for the defendant and against the plaintiff with costs, and for such other and further relief as may to the court seem just and proper, the premises considered.

M. L. IGOE.
United States Attorney.
WM. M. LYTLE.
Attorney, Dept. of Justice.

Dated at Chicago, Oct. 11, 1937.

Receipt hereof is acknowledged this 18th day of October 1937.

EDWARD H. S. MARTIN.
Attorney for the Plaintiff.

13-14 In United States District Court, Northern District of Illinois, Eastern Division

No. 45443

CHARLES F. TOWERY, ETC. AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED,

vs.

UNITED STATES OF AMERICA

Judgment

December 1, 1937

Present: Honorable J. LEROY ADAIR, District Judge.

This day comes the United States by the United States Attorney and enters herein its motion to dismiss which motion is sustained and

It is ordered that the Plaintiff's petition filed herein be and the same is hereby dismissed at Plaintiff's costs therefore it is considered by the Court that the Defendant do have and recover of and from the Plaintiff Charles F. Towery as Administrator of the Estate of Robert C. Towery deceased its costs and charges in this behalf expended to be paid in due course of administration to which ruling of the Court the Plaintiff by his attorney duly excepts and ninety (90) days time from this date is allowed the plaintiff within which to file his Bill of Exceptions herein.

15 In United States District Court

[Title omitted.]

Petition for appeal

Filed Jan. 24, 1938

To the Honorable WILLIAM H. HOLLY,
Judge of said court:

And now comes Charles F. Towery in his own right and as Administrator of the Estate of Robert C. Towery, deceased, the plaintiff in the above-entitled cause, by Edward H. S. Martin, his attorney, and feeling himself aggrieved by the final judgment of this court entered against him in favor of the United States of America, defendant, on the 1st day of December A. D. 1937, hereby prays that an appeal may be allowed to him therefrom to the United States Circuit Court of Appeals for the Seventh Circuit, and in connection with his petition herewith presents his assignment of errors.

And the said plaintiff further prays that he may be allowed to prosecute his said appeal in forma pauperis, for the reasons set forth in the affidavit herewith submitted.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.

16-17 STATE OF ILLINOIS,
County of Cook, ss:

Charles F. Towery being first duly sworn on his oath says that he is a citizen of the United States of America; that he is the plaintiff in the above entitled cause and the appellant mentioned in the foregoing petition for appeal and in the assignment of errors herewith submitted; that this affiant has a wife dependent upon him for support and has no money or property and his only income consists of wages of only $60.00 per month and the use of an apartment; that the said Robert C. Towery, deceased, left no property or estate except the claim sued upon in the said cause; that this affiant will be able to spare from his said wages only sufficient money to pay for the printing of his briefs on said appeal, as the said wages are barely sufficient for that and for the support of this affiant and his said wife; that because of his poverty he is unable to pay

costs of such appeal or to give security for the same and that erily believes that he is entitled to the redress he seeks by such eal, for the reasons set forth in the assignment of errors here- submitted, and therefore prays that he may be given leave rosecute such appeal without the payment of costs or the giving ecurity therefor; and further affiant saith not.

CHARLES F. TOWERY.

ubscribed and sworn to before me this 21st day of January A. D.

EAL] DENNIS F. PARSONS,
Notary Public.

In United States District Court

Title omitted.]

Assignment of errors

Filed Jan. 24, 1938

nd now comes the plaintiff-appellant, by Edward H. S. Martin, attorney, and in connection with his petition for appeal in the ve entitled cause says that in the record and proceedings and in final judgment aforesaid, manifest error has intervened, to the udice of the plaintiff-appellant, to-wit:

The District Court erred in granting the motion of the defend- to dismiss the said suit and dismissing the same.

The final judgment of said District Court in said cause is con- y to law.

y reason whereof the said plaintiff-appellant prays that the gment aforesaid may be reversed and that the said cause may remanded to the said District Court with directions to deny the motion.

EDWARD H. S. MARTIN,
Attorney for Plaintiff-Appellant.

[Omitted.]

In United States District Court

Title omitted.]

Order allowing appeal

Jan. 24, 1938

is hereby ordered that the plaintiff be, and hereby is, allowed an eal to the United States Circuit Court of Appeals for the Seventh cuit from the final judgment entered on the 1st day of December,

A. D. 1937, in this cause, and that he be, and hereby is, given leave to prosecute such appeal without payment of costs or giving of security therefor.

HOLLY,
District Judge.

21 [Omitted.]

22 In United States District Court

Bill of exceptions

Filed Jan. 21, 1938

Be it remembered that on November 9 A. D. 1937, the above entitled cause came on for hearing in the District Court of the United States for the Northern District of Illinois, Eastern Division, before the Honorable J. LeRoy Adair, District Judge, on the motion of the defendant filed November 5 A. D. 1937, to dismiss the said suit. Mr. Edward H. S. Martin appeared as attorney for the plaintiff, and the Honorable Michael L. Igoe, United States Attorney, by Messrs. William M. Lytle and B. F. Schwartz, Attorneys, Department of Justice, appeared for the defendant. The said motion is in words and figures as follows:

23 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 45443

CHARLES F. TOWERY IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

MOTION TO DISMISS

Comes now the defendant, the United States of America, by its attorneys of record, Michael L. Igoe, United States Attorney, and William M. Lytle, Attorney, Department of Justice, and moves the court that this law suit be dismissed for the reason that it is barred by the Statute of Limitations as provided for in Section 19 of the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, as amended July 3, 1930.

In support of the above motion to dismiss the defendant alleges and offers to prove:

I. That no claim for insurance benefits was received by the Veterans' Administration prior to February 6, 1932.

Wherefore, the defendant prays that the plaintiff's petition be dismissed, that the plaintiff take nothing by this action, that judgment be entered for the defendant and against the plaintiff with

costs, and for such other and further relief as may to the court seem just and proper, the premises considered.

MICHAEL L. IGOE,
United States Attorney.
WILLIAM M. LYTLE,
Attorney, Dept. of Justice.

Dated at Chicago Oct. 11, 1937.
Receipt hereof is acknowledged this 18th day of October 1937.

EDWARD H. S. MARTIN,
Attorney for the Plaintiff.

24 No evidence was offered or received at the hearing of said motion, but the said motion was heard on the face of the plaintiff's petition and the said motion, the granting of which motion was duly objected to by the plaintiff, and after arguments of counsel the said motion was taken under advisement by the court and on December 1 A. D. 1937, the court, by its judgment entered of record on that day, granted the said motion and dismissed the plaintiff's petition at the plaintiff's costs; to which action of the court plaintiff then and there duly excepted and was then and there allowed by the court ninety days in which to file his bill of exceptions in said cause; which was all that occurred at the hearing of the said motion.

And inasmuch as the foregoing does not fully appear of record the plaintiff tenders this, his bill of exceptions, within the time allowed by law and the extension of time so allowed by the court in said cause, and prays that the same may be certified as such and thereby made a part of the record in said cause; all of which is accordingly done this 21st day of January A. D. 1938.

[SEAL]

J. LEROY ADAIR,
District Judge.

O. K.:
M. L. IGOE.
B. F. SCHWARTZ.

25-26 [File endorsement omitted.]

27 In United States District Court

[Title omitted.]

Stipulation as to transcript of record

Filed Jan. 24, 1938

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in making up the transcript of the record to be submitted to the United States Circuit Court of Appeals for the Seventh Circuit on appeal in said cause, may include in such transcript the following records

and files in said cause, using originals where permitted by law and copies otherwise, to-wit:

1. Petition filed June 29, 1936.
2. Affidavit of service filed July 27, 1936.
3. Motion to dismiss filed November 5, 1937.
4. All orders and judgment entered December 1, 1937.
5. Petition for appeal filed January 24, 1938.
6. Assignment of errors filed January 24, 1938.
7. Order entered January 24, 1938, allowing appeal.
8. Bill of exceptions filed January 21, 1938.
9. Citation filed January 24, 1938.
10. This stipulation.

Chicago, January 24, 1938.

EDWARD H. S. MARTIN,
Attorney for Plaintiff-Appellant.
M. L. IGOE,
U. S. Attorney,
Attorney for Defendant-Appellee.
By B. F. SCHWARTZ.

28 [Clerk's certificate to foregoing transcript omitted in printing.]

29–30 [Citation in usual form showing service on M. L. Igoe, filed Jan. 24, 1938, omitted in printing.]

31 [Clerk's certificate to foregoing transcript omitted in printing.]

32 [Caption omitted.]

33 In United States Circuit Court of Appeals, Seventh Circuit

April 27, 1938

6567

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR, ETC., PLAINTIFF-APPELLANT

vs.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Minute entry

Now this day come the parties by their counsel and this cause now comes on to be heard on the transcript of record and briefs of counsel, and on oral argument by Mr. Edward H. S. Martin, counsel for appellant, and by Mr. J. Gregory Bruce, counsel for appellee, and the Court having heard the same, takes this matter under advisement.

In United States Circuit Court of Appeals for the Seventh Circuit

October Term, 1937. April Session. 1938

No. 6567

CHARLES F. TOWERY IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal From the District Court of the United States for the Northern District of Illinois, Eastern Division

Opinion

Filed June 18, 1938

Before SPARKS, MAJOR, and TREANOR, Circuit Judges.

TREANOR, Circuit Judge. This is an appeal from a judgment of the District Court dismissing the suit at plaintiff's cost. The suit was brought on claims under two war risk insurance policies, the plaintiff seeking to recover as beneficiary under the policies for death benefits and as administrator for total permanent disability benefits.[1]

The complaint alleged that insured, the deceased, became totally and permanently disabled on June 18, 1919, during the life of the policy; that the insured thereby became entitled to receive monthly payments in installments of $57.50 each; and that insured died April 2, 1927. The plaintiff further states in his complaint that under the policy the defendant agreed to pay to the beneficiary on the death of the insured like installments until there should be paid a total of 240 monthly installments, less whatever number of installments, if any, which had been paid to the insured.

The defense of statute of limitations was raised by motion to dismiss and the motion was sustained.

36 The following statutory provisions were the basis of the District Court's granting a motion to dismiss:[2] "No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date. * * * Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: * * *"

[1] The two policies were identical and we shall treat them as one policy for purposes of our discussion.

[2] Title 38 U. S. C. A. Sec. 445 (Section 19 World War Veterans' Act, 1924, as amended July 3, 1930.)

It is the defendant's contention that the "happening of the contingency" upon which the claims in the instant case are founded was the "alleged occurrence of permanent total disability of the insured;" and that the occurrence of the permanent total disability of the insured in 1919 started the statute of limitations running against the plaintiff's claims, both as personal representative of the insured and as beneficiary under the policies.

If the defendant's contention is correct the District Court properly sustained the motion to dismiss, since under the government's theory the statutory period had expired long before suit was brought.

It is clear that the period of limitation begins to run when "the right accrued." The "right" is the right which is asserted in the suit; and by further statutory declaration this right accrues upon "the happening of the contingency on which the claim was founded." But the right which has accrued is a *right* "for which the claim is made." And by force of the foregoing language, the right which is asserted by the allegations of the complaint in this case is a right to receive payment of insurance benefits for which claims are made, that is, total and permanent disability benefits and death benefits.

At the outset we should note that the contract of insurance covers two rights for each of which a claim may be made, a right which may accrue to the insured for disability benefits; and a right which may accrue to the beneficiary for death benefits. Our question then is, what was the contingency upon which the respective claims for benefits under the insurance policy was founded, since each right in suit accrued upon the happening of that contingency.

For the purposes of a suit to enforce a right, for which a
37 claim is made, the contingency upon which the claim is founded must bear such a relation to the claim that, in the case of the non-happening of the contingency, the claim is unenforcible. By the terms of the contract of insurance contained in the policy a claim for death benefits could not be enforced without the happening of the death of the insured. But if no question of lapse of policy by reason of non-payment of premiums is involved in a suit, it is not necessary for a beneficiary to prove that there has been total and permanent disability. When, as in the instant case, the insured had discontinued payment of premiums several years before his death, it would be an essential fact of plaintiff's case that total and permanent disability occurred at a time prior to the discontinuance of the payment of the premiums. Otherwise the beneficiary would fail to show the existence of a valid contractual obligation at the time of the death of the insured. But it is clear that the claim for death benefits is founded on the "happening of the contingency" of total and permanent disability only in the same sense that it is founded on the "happening of the contingency" of the payment of insurance premiums during the life of the insured.

The term "contingency" is not defined by the statute. Consequently, if the contract of insurance does not disclose the "contingency" the

atutory limitation cannot be applied, since courts are not at liberty devise a "contingency" upon which to found a claim. But there hould be no difficulty in determining the "contingency" upon which claim for insurance benefits is founded in view of the definite designaion of the two possible contingencies in the language of the contract f insurance.

Under the terms of the insurance policy the government agrees to ay a principal amount, converted into monthly installments, "to the eneficiary or beneficiaries hereinafter designated, commencing upon he death of the insured, while the insurance is in force." It is aparent from the provisions of the contract of insurance that a beneiciary has no enforcible legal claim for the payment of benefit installents until the death of the insured, and it is difficult to preceive ow the happening of the contingency of "total and permanent disbility" can be the foundation of a claim for money payments when ich clair is not legally enforcible until the happening of another ontinger y, the death of the insured; and when the claim may be enforcible without the happening of the first contingency.

The insurance contract between the government and the insured binds the government to pay a principal amount in ated monthly installments, the number of installments being limited 240. By the terms of the policy the government is obligated to pay e *insured* monthly installments in case of total and permanent disbility, the obligation to pay "commencing with such disability as tablished by the award of the director of the Bureau and continuing uring such disability." If the insured should collect the 240 installents, the contractual obligation of the government is at an end. But ere is a further contractual obligation running to the *beneficiary*, e maturing of which is contingent upon the death of the insured. he insurance contract combines the features of both disability and fe insurance. The government is no less obligated in respect to the fe insurance feature than in respect to the total and permanent sability feature, and no less legally obligated to the persons who come entitled to the life insurance benefits than to the insured if he comes entitled to the disability benefits. But since by the terms of e policy the government's liability for payment is limited to 240 ayments, it may happen in a particular case that the government can scharge its obligation by making monthly payments during the life the insured. But the government cannot discharge any obligation the beneficiary under the insurance contract during the lifetime of e insured for the simple reason that no obligation exists in favor of e beneficiary until the death of the insured. Upon the death of the sured the beneficiary, by the terms of the contract, is entitled to ceive monthly installments for a period not exceeding 240 months. he conclusion seems inescapable that factually and legally the claim r these monthly installments is founded upon the death of the sured. When that contingency takes place, the legal right to the yment of such installments has accrued.

We conclude that the happening of the contingency on which the claim of the beneficiary is founded is the occurrence of the death of the insured; and, consequently, the right for which the claim is made accrued at the death of the insured.

In respect to the right of the insured to receive monthly installments in case of total and permanent disability the insurance contract provides for payment of monthly installments "to the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, *commencing with such disability* as established by the award of the director of the Bureau and continuing during such disability." [Our italics.] It is clear from the foregoing that if the disability benefit consisted of a determinable amount, unaffected by the termination of disability, the "happening of the contingency on which the claim was founded" would be the inception of the condition of total and permanent disability; and by the terms of the statute the right would accrue and the statute of limitations would begin to run at that time, even if the determinable amount should be payable in monthly installments. But the contract of insurance against permanent and total disability provides for possibility of discontinuance of such disability, as well as its continuance, and limits monthly payments to such time as the disability continues. In other words, by the very terms of the contract of insurance the right to payment of disability benefits which accrues upon the inception of permanent and total disability is in fact a right to the payment of the several installments as each becomes due during the continuance of the disability. Consequently, continuance of disability is an element in the contingency upon which the claim is founded since no installment becomes due and payable except during the continuance of disability. In the case of death a right accrues to the beneficiary to payment of all death benefits which will ever become payable under the terms of the contract. But by the terms of the contract the right of the insured to receive any particular payment of a monthly installment cannot accrue legally until the payable date arrives during continuance of disability, since the government owes no duty to make payment on any other contingency.

39

It necessarily follows that the statute of limitations cannot start running against the insured, in respect to any particular installment of disability benefits, before the payable date for such installment, since the arrival of the payable date during continuance of disability consummates the contingency upon which the claim is founded.

At the death of the insured on April 22, 1927, any right to payment of disability benefits ceased to exist. On February 11, 1932, the running of the statute of limitations was suspended since on that date the administrator filed his claim for installments for total permanent disability benefits which had become due up to the date of the death of the insured. Consequently, the bar of the statute was not effective as to any installments payable within six years prior to February 11, 1932, and before the death of the insured: therefore the admin-

40 istrator had a valid enforcible claim for all monthly installments of disability benefits which accrued during the period from February 11, 1926, up to and including the date of death of the insured, April 22, 1927.

The government has urged that the view, which we are now adopting, runs counter to the purpose of the statutory limitations. But, as pointed out in our discussion, the statute neither designates nor defines "contingency"; and we must assume that Congress used the term "contingency" with knowledge of the provisions of the yearly renewable term insurance policies and of the rights and duties created thereby. We cannot assume an intention on the part of Congress to cut off claims arbitrarily when it used language which necessarily prolonged the life of the claims, if applied with due regard for the provisions of the contracts of insurance under which the claims arose. That it was not the purpose of Congress to cut off, but to continue protection of, interests of persons entitled to insurance benefits, was indicated by the fact that the statute expressly authorized suits to be brought any time prior to July 3, 1931, regardless of the time of the accrual of a right for which a claim was made. And in view of that provision, the government's position, if accepted, would lead to arbitrary results. For example, in the instant case if the insured had become totally and permanently disabled on June 18, 1919, and had lived beyond July 3, 1931, he could have brought suit any time prior to that date or, even beyond that date, within an extended period of time gained by reason of pendency of claim. But if the insured had lived and had filed his claim on July 4, 1931, any suit subsequently filed by the insured or his administrator, on such claim would have been barred. And if the insured had died prior to July 3, 1931, and his beneficiary had filed a suit on or before that date, the beneficiary could have recovered. But if the beneficiary had filed a claim on July 4, 1931, any suit based upon that claim would have been barred under the government's interpretation of "contingency upon which the claim is founded."

While the six year limitation for filing of a suit necessarily becomes restrictive in its effect upon claims, yet it undoubtedly was intended to relieve against hardships resulting from the fixing of the arbitrary date of July 3, 1931. This is clear from the provision of the act which allows a suit to be brought within six years after the right accrued or within one year after July 3, 1930, *whichever is the later date*. Evidently Congress was not actuated by a desire to cut off any meritorious claims, even though they might be
41 classed as "stale," since the act extended the time for suit on any claim to July 3, 1931, even though the contingency on which the claim was founded might have happened as far back as 1917.

When Congress provided for the change from yearly renewable term insurance to converted insurance the act provided, with certain exceptions, that "all yearly renewable term insurance shall cease on

July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927." [3] By force of the foregoing provision all rights to insurance benefits under yearly renewable term policies were kept alive in case of death or permanent disability prior to July 2, 1927, assuming, of course, that death or permanent and total disability had occurred during the life of the policy. The continuance of the insurance was not conditioned upon the insured's, or on the beneficiary's, having filed a claim prior to July 2, 1927, or within any limited period thereafter.

The foregoing, as well as other legislative declarations, disclose a recognition by Congress that the government was bound by the yearly renewal contracts of insurance to pay a stated amount of insurance benefits in the form of 240 monthly installments, and indicate a clear intention on the part of Congress that this obligation be performed in all meritorious cases; and to give a construction to the phrase, "contingency upon which the claim was founded," which is inconsistent with the terms of the yearly renewal term policies, and which would result in cutting off meritorious claims, would conflict with the liberal purpose which runs throughout all the Congressional acts which relate to the enforcement of claims for insurance benefits under these policies.

We conclude that the District Court was in error in sustaining the government's motion to dismiss. The judgment is reversed with instructions to the District Court to overrule the motion to dismiss and for further proceedings not inconsistent with this opinion.

42 In United States Circuit Court of Appeals, Seventh Circuit

6567

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED, PLAINTIFF-APPELLANT

vs.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Judgment

June 18, 1938

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the Judgment of the said District Court in this cause be, and

[3] 38 U. S. C. A., sec. 512.

the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court with instructions to the said District Court to overrule the Motion to Dismiss, and for further proceedings not inconsistent with the Opinion of this Court.

It is further ordered, in the event that a money judgment is recovered by the Plaintiff against the Defendant in this cause, that Twenty-Five Dollars and Fifteen Cents ($25.15), costs of plaintiff in this Court, be taxed against said plaintiff; and that said amount be deducted from said Judgment if obtained, and transmitted by the Clerk of the District Court to the Clerk of this Court, who is to account for same, when received, in his report of earnings.

43 *Recital as to issuance of mandate*

And afterwards, to-wit: On the fifteenth day of July 1938 the Mandate of this Court issued to the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division.

44 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE 1938

Supreme Court of the United States

Order allowing certiorari

Filed October 24, 1938

The petition herein for a writ of certiorari to the United States rcuit Court of Appeals for the Seventh Circuit is granted. And is further ordered that the duly certified copy of the transcript of e proceedings below which accompanied the petition shall be eated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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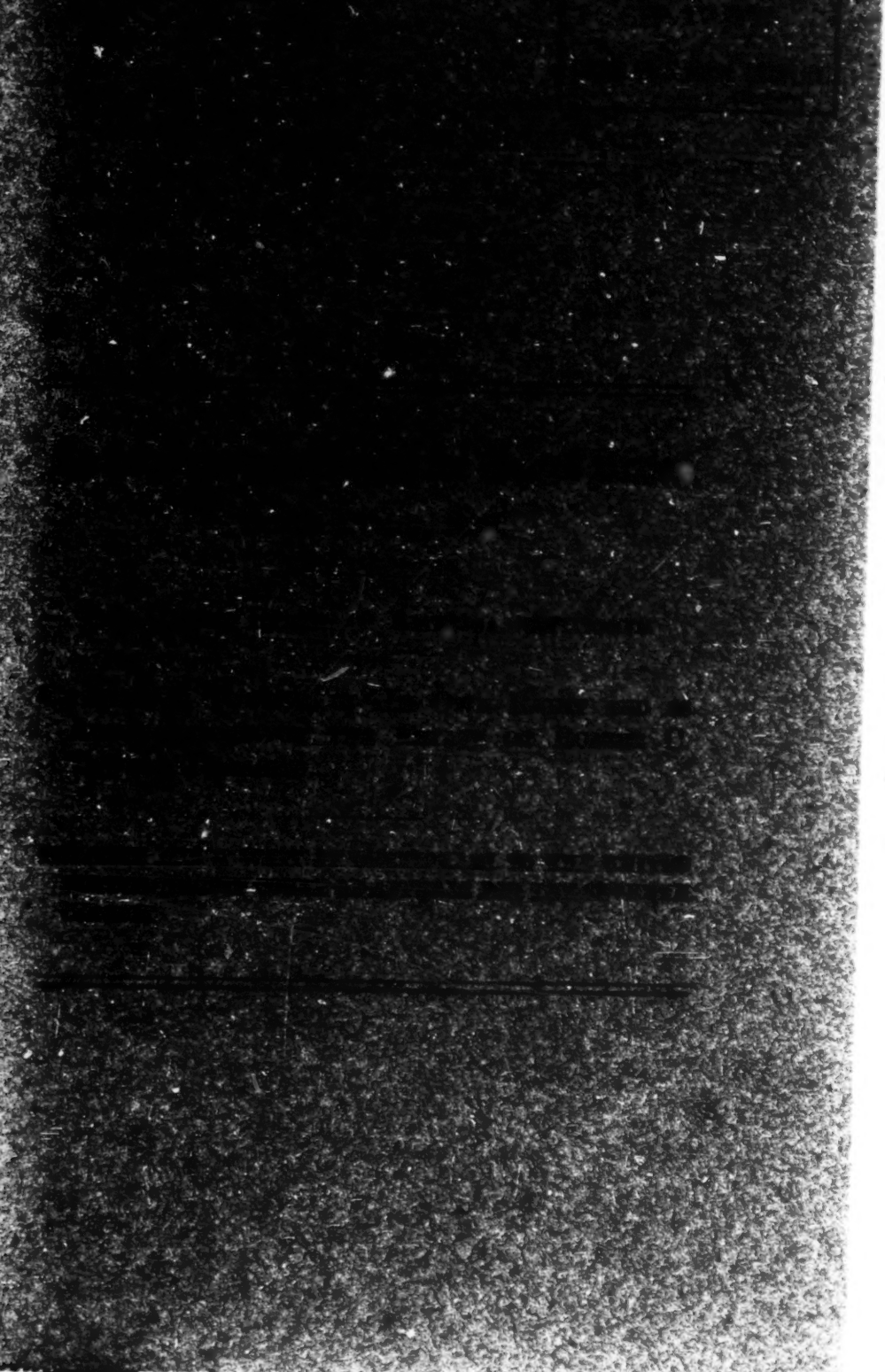

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 360

THE UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled case on June 18, 1938.

OPINIONS BELOW

The District Court of the United States for the Northern District of Illinois rendered no opinion. The opinion of the Circuit Court of Appeals (R. 11–16) is reported in 97 F. (2d) 906.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 18, 1938 (R. 16). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the six-year limitation provision in Section 19 of the World War Veterans' Act, 1924, as amended, began to run against the respondent's suit to recover installments of total permanent disability benefits under a contract of war risk term insurance on the date as of which each installment of such benefits accrued, or as of a date not later than the last day the insurance was in force by premium payments.

2. Whether the same limitation provision began to run against the suit of the respondent as the beneficiary of such a policy upon the date of the insured's death at a time when the policy was not in force by premium payments, or as of a date not later than the last day the insurance was in force by premium payments.

STATUTES INVOLVED

Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, c. 849, 46 Stat. 992 (U. S. C., Title 38, Sec. 445), provides in part:

> No suit on yearly renewable term insurance shall be allowed under this section

unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * * : *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * *

* * * * *

The Act of June 29, 1936, c. 867, Sec. 404, 49 Stat. 2034 (U. S. C., Title 38, Sec. 445d), provides in part:

That in addition to the suspension of the limitation for the period elapsing between the filing in the Veterans' Administration of the claim under a contract of insurance and the denial thereof by the Administrator of Veterans' Affairs or someone acting in his name, the claimant shall have ninety days from the date of the mailing of notice of such denial within which to file suit. This Act is made effective as of July 3, 1930, and shall apply to all suits now pending against the United States under the provisions of section 19, World War Veterans' Act, 1924, as amended; * * * *Provided,* That on and after the date of enactment of this Act, notice of denial of the claim under a con-

tract of insurance by the Administrator of Veterans' Affairs or someone acting in his name shall be by registered mail directed to the claimant's last address of record: *Provided further,* That the term "denial of the claim" means the denial of the claim after consideration of its merits.

Other statutes mentioned in this petition, together with Congressional committee reports and bulletins of the Treasury Department, appear in the Appendix, *infra,* pp. 23–28.

STATEMENT

Charles F. Towery, the respondent, brought this suit in the District Court of the United States for the Northern District of Illinois, in his own right and as administrator of the estate of Robert C. Towery, upon claims under two war risk term insurance policies alleged to have been issued to the plaintiff's decedent while in the military service of the United States. Respondent sought to recover total permanent disability benefits under the policies in his capacity as administrator and death benefits as the beneficiary designated in the policies (R. 1–4).

It was alleged in the complaint that the premiums on the policies were deducted from the insured's pay during his military service, from which he was discharged June 18, 1919; that he became totally and permanently disabled, while the poli-

cies were in force,[1] on June 18, 1919; that he died April 22, 1927; that on May 2, 1927, respondent was appointed administrator of his estate; that on February 11, 1932, respondent made claim for disability and death benefits under the policies; and that his claim was denied in the Veterans' Administration on August 8, 1935 (R. 1–4). This suit was brought on June 29, 1935 (R. 1).

The Government moved to dismiss the suit on the ground, in effect, that it was barred by the six-year limitation provision contained in Section 19 of the World War Veterans' Act, 1924, as amended (*supra*, pp. 2–3). After hearing on the motion, at which no evidence was introduced (R. 9), the motion was granted and judgment was entered for the Government (R. 5–6, 9).

Respondent appealed, assigning error to the ruling on the motion (R. 7).

The Circuit Court of Appeals for the Seventh Circuit reversed, holding (R. 11–16):

(1) That the suit was not barred by the statute of limitations as to respondent's claim as administrator to any installments of total permanent disability benefits which had accrued within six years prior to the filing of the claim for such benefits in the Veterans' Administration; and

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[1] Under the regulations of the Bureau of War Risk Insurance (T. D. 45, *infra*, Appendix, pp. 26–27) the first premium subsequent to the insured's discharge from military service became due July 1, 1919, and the grace period for the payment of that premium expired July 31, 1919.

(2) That the suit was in time as to all benefits claimed by respondent as beneficiary of the policies.

The court below, in its opinion, stated that the statute itself did not define the "contingency" on the happening of which, under its terms, "the right accrued for which the claim is made" and the statute began to run, but said that the term "contingency" must be construed in the light of the policy provisions. Construing the term in this light, the court was of the view that, as to the claim for total permanent disability benefits, the statute did not begin to run against suit as to any particular installment of such benefits until the installment accrued and that, as to respondent's claim as beneficiary, it did not begin to run until the death of the insured.

While conceding that in cases like the one at bar it would be "an essential fact" of a beneficiary's claim "that total and permanent disability occurred at a time prior to the discontinuance of the payment of premiums" since no "valid contractual obligation" would otherwise arise in his favor on the death of the insured, the court below based its decision that the death of the latter was "the contingency on which the claim is founded" and which started the statute running upon the fact that there were "no enforceable legal claims for the payment of benefit installments" until then and upon the court's interpretation of the policy as giving the beneficiary, upon the death of the in-

sured, the right to the payment of a determinable amount of benefits.[2]

It is stated in the opinion, in substance, that if, upon the maturity of the policy by total permanent disability, the amount of the *disability* benefits which would be payable to the insured had also been determinable, "the 'happening of the contingency on which the claim is founded' would be the inception of the condition of total and permanent disability," even though the amount was payable in installments; but that in the case of such benefits, as distinguished from those to which the beneficiary would be entitled, "the right of the insured to receive any particular payment of a monthly installment cannot accrue legally until the payable date arrives during continuance of disability";[3] and that it necessarily follows that the statute could not run as to any particular installment of such benefits before the payable date of such installment, "since the arrival of the pay-

[2] Actually, the maximum amount to which the beneficiary may ultimately be entitled is not determinable upon the death of the insured. Section 303, World War Veterans' Act, 1924, as amended by the Act of March 4, 1925, c. 553, 43 Stat. 1302, 1310 (U. S. C., Title 38, Sec. 514), provides that the value of any installments becoming payable after the death of the beneficiary shall be paid to the estate of the insured.

[3] No basis exists for a distinction between the beneficiary and the insured or his personal representative as to the determinability of the amounts payable. See Footnote 2.

able date during continuance of disability consummates the contingency upon which the claim is founded."

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that, although the right of an insured or his personal representative to installments of war risk term insurance benefits is dependent upon the existence of total permanent disability of the insured during the life of the policies, the statute of limitations, nevertheless, did not begin to run against suit to recover any installment which accrued after the life of the policies until such installment became payable.

(2) In adopting an interpretation of the statute of limitations which leaves no time limitation whatever upon suits by veterans insured under war risk term insurance policies to recover total permanent disability benefits under such policies, and in this connection

(a) In holding that the number of monthly installments payable as benefits under such policies, by reason of total permanent disability, is limited to two hundred forty, and

(b) In failing to hold that the monthly installments of such benefits are payable throughout the duration of total permanent disability, regardless of how long it might continue.

(3) In failing to hold that the statute began to run as to each of the respondent's claims upon the

date of the existence within the life of the contract of the total permanent disability of the insured which establishes the obligation to pay benefits in accordance with the terms of the contract.

(4) In failing to hold, therefore, that the latest date on which the six-year limitation could begin to run as to either of the respondent's claims to any benefits was July 31, 1919, the last day on which insurance protection existed.

(5) In disregarding the termination of the suspension of the limitation upon the effective date of the denial of respondent's claim for total permanent disability benefits in the Veterans' Administration, in its computation of the number of installments of benefits payable prior to the filing of the claim.

(6) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Circuit Court of Appeals is squarely in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Tarrer,* 77 F. (2d) 423, 425, certiorari denied, 296 U. S. 574, where it was held, upon facts substantially similar to those in the instant case, that the "contingency" on which the claim of a beneficiary under a war risk term insurance contract was founded, which started the running of the statute of limitations against suit on the claim, was "not the death of the insured in

1930, but his total and permanent disability at the time the policy lapsed in 1919"; and that no other limitation applied to the beneficiary's claim than applied to that of the insured.

(2) The decision of the Circuit Court of Appeals in so far as it involves the holding that the statute of limitations does not begin to run against suit to recover any installment of total permanent disability benefits under a contract of war risk term insurance until the installment accrues, is contrary to the decision of this Court in *Tyson* v. *United States,* 297 U. S. 121, to the decisions of the Circuit Court of Appeals for the Seventh Circuit itself in *United States* v. *Lund,* 76 F. (2d) 723, rehearing denied April 4, 1935; *United States* v. *McQuilkin,* 88 F. (2d) 476, certiorari denied, 301 U. S. 683; and *United States* v. *Craig,* 83 F. (2d) 361, rehearing denied May 12, 1936; and to the decisions of other Circuit Courts of Appeals and District Courts generally. See, for example, *United States* v. *Tarrer, supra; Stallman* v. *United States,* 67 F. (2d) 675 (C. C. A. 8th); *Roberts* v. *United States,* 66 F. (2d) 273 (C. C. A. 10th); *Wilson* v. *United States,* 70 F. (2d) 176, 179 (C. C. A. 10th); *Carson* v. *United States,* 37 F. (2d) 946 (D. Idaho); and *Baker* v. *United States,* 15 Fed. Supp. 982 (D. Idaho).

(3) That the questions involved are of public importance cannot be doubted in view of the fact that they relate to rights to sue the Government

upon several million war risk term insurance policies involving several billion dollars.[4]

Under the court's construction of the statute, there would be no time limitation whatever upon suits to recover total permanent disability benefits by veterans to whom war risk term insurance policies were issued, so that suit might be brought at any time after a denial of a claim for insurance benefits in the Veterans Administration on any of the several million policies which were originally issued, so long as the veteran to whom the policy was issued remains alive, and new suits may be brought by veterans in all cases in which prior suits have been dismissed as barred by the statute of limitations.

That the construction adopted by the Circuit Court of Appeals would leave no time limitation whatever upon suits by veterans to recover total permanent disability benefits is apparent from the facts that no limit is placed by the policies upon the number of installments payable during the total permanent disability of the insured, and that consequently if, as held by the court below, the statute of limitations does not begin to run against

[4] Over four and one-half million of such policies were issued during the War, amounting to about forty billion dollars. *Lynch* v. *United States*, 292 U. S. 571, 576, footnote 2. According to the Annual Report of the Administrator of Veterans' Affairs for the year 1937, p. 65 (which is the latest report available), less than 194,447 of these policies had at that time been eliminated, as possible bases for suit, by awards of benefits upon them.

suit on any installment of such benefits until it accrues, any veteran having a claim to such benefits may, in the event of denial of his claim, bring suit at any time, asserting that his policy had matured by total permanent disability prior to the date when it would otherwise have expired for nonpayment of premiums.

In this connection, the statement in the opinion of the court below (R. 13) that the obligation of the Government to pay total permanent disability benefits under a war risk term insurance contract is limited to the payment of two hundred forty installments, is contrary to the terms of the policy,[5] when considered in the light of Section 402 of the War Risk Insurance Act, as amended by the Act of October 6, 1917 (Appendix, *infra*, pp. 23–24), under which the policy was issued. That section provides that payment shall be made "during total and permanent disability", and it is quite apparent that there was no intention to limit the number of installments thus payable, in view of the provision in the section that, in making all calculations in connection with this insurance, "no deduction shall be made for continuous installments during the life of the insured *in case his total and permanent disability continues more than two hundred and forty months.*" [Italics ours.] Moreover, the Act was so interpreted, with the full approval of the Bureau of

[5] See Bulletin No. 1, Treasury Department, October 15, 1917, Appendix, *infra*, pp. 24–25.

War Risk Insurance, by Judge Julian W. Mack, in explaining its provisions at a conference of officers and enlisted men of the Army and Navy, held in Washington in October 1917, immediately after the publication of the terms of the contract. (See Bulletin No. 3, Treasury Department, October 16, 1917, Appendix, *infra,* pp. 25–26).

While it is true that, under the interpretation of the statute adopted by the court below, in a case like the one at bar, where the claim for total permanent disability benefits has been filed subsequent to July 3, 1931, the recovery by suit is limited to installments which have accrued within six years prior to the filing of the claim, it seems unlikely that the Veterans' Administration would reject a claim filed, subsequent to the entry of a judgment, to recover all benefits which accrued prior to those embraced in the judgment. In *United States* v. *Worley,* 281 U. S. 339, it was held that the judgment in a war risk insurance case should not include installments maturing after the suit was brought. It is said in the opinion, however (p. 341):

> Undoubtedly, when one's right to recover is established by judgment, the Veterans' Bureau will pay him installments maturing in his favor after the commencement of the action.

Pursuant to the view thus expressed by this Court, it has been the consistent administrative

practice to pay installments, not embraced in a judgment, which have accrued subsequent to the bringing of suit, so long as the plaintiff remains totally and permanently disabled. The plaintiff's right to recover installments maturing *prior* to the commencement of the action is as well established by judgment as his right to recover those maturing thereafter. The limitation on the number of installments recoverable by suit would, therefore, seem inconsequential.

The extent of the departure from a policy of affording protection against stale claims involved in the interpretation of the statute of limitations by the Circuit Court of Appeals is further shown by the fact that no premiums have been paid since the War on more than three million policies,* and suits to recover benefits under them would involve as their principal issues the question of whether the insured persons were totally and permanently disabled prior to the date, many years in the past, when the policies would otherwise have expired for nonpayment of premiums.

(4) The construction of the statute adopted by the Circuit Court of Appeals is at variance with the purpose of the statute to protect the Government against the assertion of stale claims. The court below states, in substance, that Congress had no intention by enacting the provisions in question of barring suits on stale but meritorious claims (R. 15);

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* See *Lynch* v. *United States*, 292 U. S. 571, 576, footnote 2.

that such an intention would have been inconsistent with the liberal purpose which runs throughout all the statutes relating to the enforcement of claims for insurance benefits under war risk term policies. It is no doubt true that Congress was actuated by a liberal purpose, since at the same time that it provided a uniform six-year limitation to take the place of the statutes of limitations of the various states it allowed also one year from the date of the enactment within which suit might be brought on all claims, thus permitting many suits to be brought which would otherwise have been barred under the state statutes (*United States* v. *Sligh*, 24 F. (2d) 636 (C. C. A. 9th), and see Committee reports which accompanied the Act of May 29, 1928, containing the original limitation provisions, Appendix, *infra*, p. 28). However, there would seem no justification for imputing a purpose so liberal as to include the removal of all time limitations upon suits in the enormous class of potential claims by veterans for total permanent disability benefits.

Furthermore, when the original limitation provisions were enacted, Congress was presumably aware that, in the event of a suit on any one of the several million policies upon which no premiums have been paid since the War, the principal issue would be whether the policy matured by total permanent disability at least as early as 1919, and that, if an indefinite period were allowed for suit

thereafter, it would be difficult and in many cases impossible, to prepare and present a proper defense by reason of the loss of memory, death or removal of witnesses, or the loss of records. Approximately nine years had already passed, and it would seem at least doubtful that Congress intended to impair further the Government's ability to defeat unmeritorious claims by allowing a longer time for suit in such cases than one year after the date of the Act. In this connection the Circuit Court of Appeals is apparently in error in construing the six-year limitation for filing suit as intended to relieve against hardships resulting from the fixing of the arbitrary date of one year after the passage of the Act. It is submitted that the correct interpretation is just the reverse. The one-year provision was intended to relieve from the hardship which would have resulted if the six-year limitation were enacted alone, since it was then more than six years since any premiums had been paid on most of the war risk term insurance policies, and suits on all such policies would have been barred under the six-year clause, unless the one-year clause had been included.

(5) The construction of the provisions in question by the Circuit Court of Appeals, furthermore, is contrary to well-established rules of statutory interpretation. The "claim" referred to in the statute, embraced, of course, the right to one or more installments of total permanent disability

benefits. The claim is, however, founded primarily as to every installment upon the existence of the disability during the period of insurance protection which matures the policy. And, while the happening of this contingency coincides with the due date for the payment of the first installment, it was evidently intended to constitute the contingency on which the claim is founded, within the meaning of the statute, as to all installments.

If, as held in effect by the court below, the "right" referred to in the statute was the right to each installment, so as to create a succession of rights with differing periods of limitation for each, the addition of the words "the contingency on which the claim is founded," apparently designed to make the intention of Congress clearer, serves no such purpose and becomes surplusage at best. The contingency clause would be equally useless under the court's interpretation of the statute with reference to the right of the beneficiary.

The interpretation adopted by the court below is, therefore, contrary to the well-settled rule of statutory construction that effect should be given, if possible, to every part of the statute, and that none of the provisions should be treated as surplusage unless it is unavoidable. *Platt* v. *Union Pac. R. R. Co.*, 99 U. S. 48, 58; *D. Ginsberg & Sons, Inc.*, v. *Popkin*, 285 U. S. 204, 208. It is also opposed to the rule that statutory waivers of the Government's sovereign immunity from suit are to be

strictly construed in its favor. *United States* v. *Michel,* 282 U. S. 656, 660; *Kemp* v. *United States,* 77 F. (2d) 213 (C. C. A. 7th); *United States* v. *Valndza,* 81 F. (2d) 615, 617 (C. C. A. 6th); *United States* v. *Arditto,* 86 F. (2d) 787, 788 (C. C. A. 6th); *Fletcher* v. *United States,* 92 F. (2d) 713, 717 (Ct. Cus. & Pat. App.); *Coleman* v. *United States,* 18 F. Supp. 71, 72 (W. D. Tenn.).

Moreover, the interpretation of the court below is inconsistent with a provision of Section 19, World War Veterans' Act, as amended, not here specifically involved and also with the provisions of Section 404 of the Act of June 29, 1936 (*supra,* pp. 3–4). Section 19, as amended May 29, 1928 (Appendix, *infra,* pp. 27–28), and as amended July 3, 1930 (*supra,* pp. 2–3), gave one year from the date of enactment within which to sue. Under the court's interpretation this would have been largely unnecessary, at least as to any case in which total permanent disability was the sole basis of the claim, since the right to recover most of the installments sought by any claimant would have existed under the six-year provision. Section 404, enacted June 29, 1936, and made retroactively effective to July 3, 1930, allowed ninety days from the effective date of administrative denial within which to sue and permitted the reinstatement of those cases which had been dismissed (in their entirety) and which would have been timely had this amendment been in effect. Under the court's in-

terpretation suits for disability benefits, at least, would not have been barred prior to this amendment, except possibly in so far as certain installments were concerned. And even in those cases the only effect of the amendment would have been to make possible the recovery of three additional installments at most.

The correct construction of the statutory provisions in question, it is submitted, is to the effect that where, as here, the right of an insured or his personal representative, and that of the beneficiary, are both dependent upon establishing the existence of total permanent disability during the life of the contract, the statute of limitations began to run as to each claim no later than the date when such contract would have lapsed and all rights thereunder would have ceased unless such disability were established, i. e. in this case on July 31, 1919. While it is true that all time limitations on suit by a beneficiary are not taken away under the interpretation of the court below, it would be possible under that interpretation in some cases for the beneficiary to bring suit as long as twenty-six years after the alleged occurrence of the total permanent disability which would constitute the principal issue involved in the case.[7] Thus, as to such claims, the statute, although not wholly defeated, would nevertheless be seriously impaired in its purpose.

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[7] If the insured died just before the expiration of twenty years after the lapse of the policy, the beneficiary could, within six years thereafter, sue for the 240th installment.

Moreover, there is no apparent reason why the beneficiary should be given the privilege of bringing suit upon a claim based upon the total permanent disability of the insured, after the insured himself has lost the privilege of asserting his claim in court based upon the same contingency. The obligation of the Government is a single obligation to pay the value of 240 installments,[6] the method of payment and the persons to whom payments are to be made being dependent upon the facts of the individual case. Cf. *Boyett* v. *United States*, 86 F. (2d) 66, 68 (C. C. A. 5th). The beneficiary is merely a "volunteer." His rights are derived from the insured, since he owes them to the insured's gratuitous designation of him as beneficiary. The insured may change the beneficiary at any time. Moreover, even after the death of the insured, his rights under the policy may be taken from him by Congress and given to others. *White* v. *United States*, 270 U. S. 175.

(6) Even if it were to be assumed that the Circuit Court of Appeals is correct in its holding that the statute of limitations did not begin to run as to any installment until the installment accrued, it erred in holding that the bar of the statute was ineffective as to any installment which accrued within six years prior to the filing of the claim for benefits in the Veterans' Administration on Feb-

[6] Only in case of total permanent disability continuing for more than twenty years may this obligation be increased.

ruary 11, 1932. It is submitted that this holding is contrary to the provisions of Section 19 of the World War Veterans' Act, 1924, as amended, *supra*, pp. 2–3). This section provides a suspension of limitations only for the period "between the filing in the bureau of the claim sued upon and the denial of said claim." Thus the statute clearly contemplates a resumption of the running of limitations upon the effective date of the administrative denial of the claim.[9] The court, however, ignores this fact. It states (R. 14–15):

> On February 11, 1932, the running of the statute of limitations was suspended since on that date the administrator filed his claim for installments for total permanent disability benefits which had become due up to the date of the death of the insured. Consequently, the bar of the statute was not effective as to any installments payable within six years prior to February 11, 1932, and before the death of the insured; therefore the administrator had a valid enforcible claim for all monthly installments of disability benefits which accrued during the period from February 11, 1926 up to and including the date of death of the insured, April 22, 1927.

[9] Section 404 of the Act of June 29, 1936 (*supra*, pp. 3–4), which provides a minimum period of ninety days from the effective date of denial within which to sue, has no bearing in this connection, since the suit was brought subsequent to the expiration of this ninety-day period.

Since the claim was denied on August 8, 1935 (R. 3) and suit was not filed until June 29, 1936 (R. 1), there was a period of 326 days, subsequent to the termination of the suspension during which limitations again ran. Consequently, even under the court's interpretation of the statute, there was a period of nearly eleven months during which the statute was not suspended and during which there would have been lost any right to the recovery of approximately eleven of the monthly installments which the court states are recoverable.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

SEPTEMBER 1938.

APPENDIX

The first authority to grant war risk insurance is contained in the Act of October 6, 1917, c. 105, Sec. 2, 40 Stat. 398, 409–410, amending the War Risk Insurance Act by adding the following section, among others:

> SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable, and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother or sister, and also during total and permanent disability to the injured person, or to any or all of them. The insurance shall be payable in two hundred and forty equal monthly installments. Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. All calculations shall be based upon the American Experience Table of Mortality and interest at three and

one-half per centum per anum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months.

Bulletin No. 1 (Regulations and Procedure, U. S. Veterans' Bureau (1930), Part II, pp. 1233, 1235) was promulgated by the Director of the Bureau of War Risk Insurance, Treasury Department, on October 15, 1917, and provides, in part, as follows:

THE UNITED STATES OF AMERICA, TREASURY DEPARTMENT, BUREAU OF WAR RISK INSURANCE

Under the authority granted by Congress in an act * * * and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:

Hereby insures from and after the — day of —, 19—, John Doe, * * * conditioned upon the payment of premiums as herein provided, for the principal amount of $5,000, converted into monthly installments of $28.75 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ per cent per annum), payable—

To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such

disability as established by the award of the director of the bureau and continuing during such disability; and

To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the insured, while the insurance is in force, and (except as otherwise provided) continuing for 240 months if no installments have been paid for total and permanent disability or if any such installments have been paid, then for a number of months sufficient to make 240 in all:

* * * * *

Unless other designation is made by the insured, such person or persons, within the permitted class of beneficiaries, as would under the laws of the place of residence of the insured be entitled to his personal property in case of intestacy shall be deemed designated as the beneficiary or beneficiaries to whom shall be paid any installments remaining unpaid upon the death, or disqualification under the provisions of the act, of any named beneficiary.

Bulletin No. 3 (Regulations and Procedure, U. S. Veterans' Bureau (1930), Part II, pp. 1241, 1258, 1259), was promulgated by the Director of the Bureau of War Risk Insurance, Treasury Department, on October 16, 1917, and provides, in part, as follows:

Explanation submitted by Hon. Julian W. Mack, of the provisions of the military and naval insurance act, presented at a conference of officers and enlisted men of the Army and Navy, held in Washington on October 16, 17, and 18, 1917. This explanation has

the full approval of the Bureau of War Risk Insurance.

WILLIAM C. DE LANOY, *Director.*

Approved:
W. G. McADOO,
Secretary of the Treasury.

SCOPE AND MEANING OF ACT OF OCTOBER 6, 1917, PROVIDING FOR FAMILY ALLOWANCES, ALLOTMENTS, COMPENSATION, AND INSURANCE FOR THE MILITARY AND NAVAL FORCES OF THE UNITED STATES.

Hon. JULIAN W. MACK.

Hon. Julian W. Mack. Mr. Chairman and gentlemen, * * *

* * * * *

Now, in its solicitude for the men and for the families, and acting—and properly acting—in a somewhat paternal manner, the Government has provided that you can not get this insurance paid out in a lump sum, and that your family can not get this insurance paid out in a lump sum. It is not only free from creditors, but it is going to be paid out only in monthly installments over a period of 20 years, which means 240 monthly installments. If, however, you become totally disabled and the total disability continues more than 20 years, the same monthly installments will be kept up for you as long as the disability continues.

Treasury Decision 45 (Regulations and Procedure, U. S. Veterans' Bureau (1930), Part I, p. 18), promulgated by the Director of the Bureau of War Risk Insurance, Treasury Department, on May 17, 1919, provided in part as follows:

1. When any person insured under the provisions of the war risk insurance act

leaves the active military or naval service for reasons not precluding the continuation of insurance, the monthly premium which, had he remained in the service, would have been payable on the last day of the calendar month in which he was discharged will be payable on the first day of the calendar month following the date of his discharge, and thereafter monthly premiums shall be payable on the first day of each calendar month. The premium payable on the first day of any calendar month may, however, be paid at any time during such month, which shall constitute a grace period for the payment of such premium. If the premium is not paid before the expiration of such grace period the insurance shall lapse and terminate.

Section 19 of the World War Veterans' Act, 1924, was amended by the Act of May 29, 1928, c. 875, 45 Stat. 964, by adding the following:

No suit shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made, or within one year from the date of the approval of this amendatory Act, whichever is the later date: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * * No State or other statute of limitations shall be applicable to suits filed under this section. This section shall apply to all suits now pending

against the United States under the provisions of this section.

In the House Committee Report (70th Cong., 1st Sess., H. Rep. 1274, p. 1) accompanying the bill which became the Act, it is said:

* * * * *

1. Section 1 of the bill amends section 19 of the act by establishing a uniform statute of limitations for suits on contracts of insurance. At the present time, under the conformity act, the statutes of limitations of the various States apply. The periods of limitations in these statutes vary from 3 to 20 years, the average being 6 years. The committee believes that the average statute of limitation, namely six years, should be applied to these suits, with an additional year from the date of passage of this amendatory act for all suits. * * *

The same statement is contained in the Senate Committee Report (70th Cong., 1st Sess., S. Rep. 1297, p. 1).

U. S. GOVERNMENT PRINTING OFFICE: 1938

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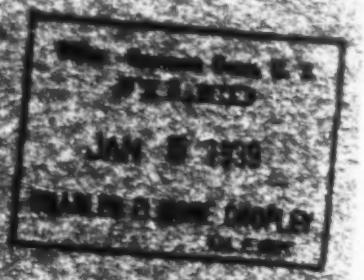

No. 590

In the Supreme Court of the United States

October Term, 1938

THE UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES P. TOWNE, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWNE, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

Cases:

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 360

THE UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court of the United States for the Northern District of Illinois rendered no opinion. The opinion of the Circuit Court of Appeals (R. 11–16) is reported in 97 F. (2d) 906.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 18, 1938 (R. 16). The petition for a writ of certiorari was filed September 17, 1938, and granted October 24, 1938 (R. 18). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of

QUESTIONS PRESENTED

1. Whether the six-year limitation provision in Section 19 of the World War Veterans' Act, 1924, as amended, began to run against the respondent's suit to recover installments of total permanent disability benefits under a contract of war risk term insurance on the date as of which each installment of such benefits accrued, or as of a date not later than the last day the insurance was in force by premium payments.

2. Whether the same limitation provision began to run against the suit of the respondent as the beneficiary of such a policy upon the date of the insured's death, at a time when the policy was not in force by premium payments, or as of a date not later than the last day the insurance was in force by premium payments.

STATUTES INVOLVED

Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, c. 849, 46 Stat. 992 (U. S. C., Title 38, Sec. 445), provides in part:

> In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and juris-

diction is hereby conferred by such courts to hear and determine all such controversies. * * * All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the bureau acknowledges the indebtedness of the United States upon any such contract of insurance and there is a dispute as to the person or persons entitled to payment, a suit in the nature of a bill of interpleader may be brought by the bureau in the name of the United States against all persons having or claiming to have any interest in such insurance in the Supreme Court of the District of Columbia or in the district court in and for the district in which any such claimants reside:***

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed

> that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * * No State or other statute of limitations shall be applicable to suits filed under this section.
>
> The term "claim" as used in this section, means any writing which alleges permanent total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or someone acting in his name on an appeal to the director.

Other statutes mentioned in this brief, together with Congressional committee reports and bulletins of the Treasury Department, appear in the Appendix, *infra,* pp. 40–48.

STATEMENT

Charles F. Towery, the respondent, brought this suit in the District Court of the United States for the Northern District of Illinois, in his own right and as administrator of the estate of Robert C. Towery, upon claims under two war risk term insurance policies alleged to have been issued to the plaintiff's decedent while in the military service of the United States. Respondent sought to recover total permanent disability benefits under the

policies in his capacity as administrator, and death benefits as the beneficiary designated in the policies (R. 1–4).

It was alleged in the complaint that the premiums on the policies were deducted from the insured's pay during his military service, from which he was discharged June 18, 1919; that he became totally and permanently disabled while the policies were in force,[1] on June 18, 1919; that he died April 22, 1927; that on May 2, 1927, respondent was appointed administrator of his estate; that on February 11, 1932, respondent made claim for disability and death benefits under the policies; and that his claim was denied by the Veterans' Administration on August 8, 1935 (R. 1–4). This suit was brought on June 29, 1936 (R. 1).

The Government moved to dismiss the suit (R. 5) on the ground, in effect, that it was barred by the six-year limitation provision contained in Section 19 of the World War Veterans' Act, 1924, as amended (*supra,* p. 3). After hearing on the motion, at which no evidence was introduced (R. 9), the motion was granted and judgment was entered for the Government (R. 5–6, 9).

Respondent appealed, assigning error to the ruling on the motion (R. 7).

---

[1] Under the regulations of the Bureau of War Risk Insurance (Treasury Decision No. 45, *infra*, Appendix, p. 44), the first premium subsequent to the insured's discharge from military service became due July 1, 1919, and the grace period for the payment of that premium expired July 31, 1919.

The Circuit Court of Appeals for the Seventh Circuit reversed, holding (R. 11–16):

(1) That the suit was not barred by the limitation provisions of Section 19, *supra*, as to respondent's claim as administrator to any installments of total permanent disability benefits which had accrued within six years prior to the filing of the claim for such benefits in the Veterans' Administration; and

(2) That the suit was in time as to all benefits claimed by respondent as beneficiary of the policies.

The court below, in its opinion, stated that the statute itself did not define the "contingency" on the happening of which, under its terms, "the right accrued for which the claim is made" and the limitation began to run, but said that the term "contingency" must be construed in the light of the policy provisions. Purporting to construe the term in this light, the court was of the view that, as to the claim for total permanent disability benefits, the limitation did not begin to run against suit as to any particular installment of such benefits until the installment accrued and that, as to respondent's claims as beneficiary, it did not begin to run until the death of the insured.

While conceding that, in cases like the one at bar, it would be "an essential fact" of a beneficiary's claim "that total and permanent disability occurred at a time prior to the discontinuance of the payment of premiums," since no "valid contractual obligation" would otherwise arise in his favor on

the death of the insured, the court below based its decision that the death of the latter was "the contingency on which the claim is founded" and which started the limitation running, upon the fact that there were "no enforceable legal claims for the payment of benefit installments" until then and upon the court's interpretation of the policy as giving the beneficiary, upon the death of the insured, the right to the payment of a determinable amount of benefits.[2]

It is stated in the opinion, in substance, that if, upon the maturity of the policy by total permanent

[2] The exact sum of money to be paid on the date of death of an insured (unless no beneficiary is living) cannot be determined at that time since, if the beneficiary dies before 240 installments have been paid, the commuted value of the unpaid installments (which includes no interest since no installments are then deferred in payment) becomes payable to the estate of the insured in one sum. Section 303, World War Veterans' Act, 1924, as amended March 4, 1925, U. S. C., Title 38, sec. 514, *McCullough* v. *Smith*, 293 U. S. 228. When the contract matures by disability, the exact sum of money to be paid cannot then be determined because, if the insured dies with no beneficiary designated, the commuted value of the unpaid installments is paid to his estate under Section 303, *supra*, or, if the beneficiary survives the insured, but dies before receiving all of the 240 installments, less those accrued prior to death, the commuted value of the unpaid installments is likewise paid under Section 303, *supra*. Moreover, if the insured remains totally permanently disabled for more than 240 months, a continuance of benefits (for which no premium is charged) is provided (see discussion, *infra*, pp. 20–21) and, if the insured recovers from his disability, the obligation to pay benefits is relieved. (See Bulletin I, Appendix, *infra*, p. 42; Section 301, World War Veterans' Act, 1924, as amended July 3, 1930, U. S. C., Title 38, sec. 512.)

disability, the amount of the *disability* benefits which would be payable to the insured had also been determinable, "the 'happening of the contingency on which the claim is founded' would be the inception of the condition of total and permanent disability," even though the amount was payable in installments; but that, in the case of such benefits, as distinguished from those to which the beneficiary would be entitled, "the right of the insured to receive any particular payment of a monthly installment cannot accrue legally until the payable date arrives during continuance of disability";[3] and that it necessarily follows that the limitation could not run as to any particular installment of such benefits before the payable date of such installment, "since the arrival of the payable date during continuance of disability consummates the contingency upon which the claim is founded."

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that, although the right of an insured or his personal representative to installments of war risk term insurance benefits is dependent upon the existence of total permanent disability of the insured during the life of the policies, the statute of limitations, nevertheless, did not begin to run against suit to recover any installment

[3] No basis exists for a distinction between the beneficiary and the insured or his personal representative as to the determinability of the amounts payable. See footnote 2, *supra*, p. 7.

which accrued after the life of the policies until such installment became payable.

(2) In adopting an interpretation of the statute of limitations which leaves no time limitation whatever upon suits by veterans insured under war risk term insurance policies to recover total permanent disability benefits under such policies and, in this connection

(a) in holding that the number of monthly installments payable as benefits under such policies, by reason of total permanent disability, is limited to two hundred forty, and

(b) in failing to hold that the monthly installments of such benefits are payable throughout the duration of total permanent disability, regardless of how long it might continue.

(3) In failing to hold that the statute began to run as to each of the respondent's claims upon the date of the existence, within the life of the contract, of the total permanent disability of the insured which establishes the obligation to pay benefits in accordance with the terms of the contract.

(4) In failing to hold, therefore, that the latest date on which the six-year limitation could begin to run as to either of the respondent's claims to any benefits was July 31, 1919, the last day on which insurance protection existed.

(5) In disregarding the termination of the suspension of the limitation upon the effective date of the denial of respondent's claim for total perma-

nent disability benefits in the Veterans' Administration, in its computation of the number of installments of benefits payable prior to the filing of the claim.

(6) In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

I

Respondent's suit, brought on June 29, 1936, to recover benefits under an insurance policy on which no premiums were paid after the month of June 1919, was not in time under the provisions of Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930, limiting the time for bringing such suits to "six years after the right accrued for which the claim is made," or one year after the date of the Act, "whichever is the later date."

It is in effect conceded in the opinion of the court below that the suit was not in time unless it could be regarded as brought within the six-year limitation period. We submit that it was not so brought, since that period began to run not later than July 31, 1919, the last day on which the policy remained in force by premium payments.

1. Despite the language of the statute showing an obvious intention to place a limitation upon *suit*, the construction adopted by the court below would provide as to disability benefits merely a limitation upon the *number of installments recoverable* by suit. This is apparent from the fact that there is no

limitation upon the number of installments payable under the policy during the total permanent disability of the insured, so that suit could be brought at any time on any one of the several million policies which were originally issued, so long as the insured remains alive. Moreover, if the construction of the statute adopted by the court below were given effect, it would be possible to reopen many cases, including two decided by this Court, in which the suits have been held to be barred by limitations.

2. The construction adopted by the court below is also at variance with an essential purpose of the statute to protect the Government against suits on stale claims.

When the original limitation provisions were enacted in 1928 Congress was, presumably, aware that, if an indefinite period were allowed for suit, it would be difficult, and in many cases impossible, for the Government to prepare a proper defense to a suit which might be brought upon any of the more than three million policies on which no premiums had been paid since the War, since the principal issue involved in each of such cases would be whether the insured was totally permanently disabled prior to a date, at least as early as 1919, when the policy would otherwise have expired for nonpayment of premiums.

Also, there would seem no justification for a construction of the statute, such as that adopted by the court below, which would have the effect of bar-

ring suit to recover some installments of disability benefits, but not others. Defense would be equally difficult as to all installments, and there would seem no basis for thus affording protection against suit as to only part of a stale claim.

Furthermore, the provisions in question, as construed by the court below, would, in reality, not restrict even the number of installments ultimately recoverable, for, if a judgment should be recovered for any installments, the maturity of the insurance would thereby be established and the Veterans' Administration, being subject to no time limitation upon the claims considered by it, would presumably pay also any installments barred from recovery by suit, if they were claimed.

3. Under the interpretation of the court below it would be possible for a beneficiary, as well as the insured himself, to bring suit based upon the existence of total permanent disability many years in the past. It would seem reasonable to assume that Congress considered the Government to be as much in need of protection against such suits by the beneficiary as against such suits by the insured. Moreover, there is no apparent reason why the beneficiary should be given the privilege of bringing suit in such cases after the insured himself has lost that privilege. The beneficiary is merely a "volunteer" whose rights are derived from the beneficence of the insured in designating him as such, which designation the insured may change at any time. Also, Congress could deprive the bene-

ciary of his rights under the policy by giving them o others even after the death of the insured. The act that the benefits sought by respondent as eneficiary did not become payable to him as such ntil after the death of the insured has no signifiance with respect to limitations since his position n this respect is obviously no different from his osition as administrator.

4. The very nature of the Government's obligaion under the insurance contract indicates that the ix-year limitation was intended to run from the appening of the contingency relied upon as having natured the contract. It is apparent from the erms of the contract that upon the happening of ither total permanent disability or death while he insurance is in force the insurance itself ceases, ince there is substituted for it at that time the bligation of the Government to pay benefits acording to the terms of the contract. The mere act that the obligation is to be discharged by payent in monthly installments does not alter its ature or the date from which limitations logically hould and was intended by Congress to run. We ubmit that it is the right to the benefits of the conract which arises correlative to the obligation of he Government to pay them which Congress had in ind in providing that limitations should begin to un when the "right accrued for which the claim is ade," and that it was not concerned in that conection with variations among individual cases ith respect to the method of payment, persons to

whom payments were to be made or the amounts payable to each.

The court below in effect concedes that the Government's interpretation of the statute would be correct at least as to disability benefits if the amount payable were determinable on the date of maturity. But this fact, we submit, is wholly immaterial in view of the nature of the obligation which arises at that time to pay all of the benefits provided by the contract whenever and to whomever they may be or become payable.

5. We submit that Congress enacted the limitation provisions in Section 19, and other provisions of that section as well, in recognition of the single obligation of the insurance contract, and for the purpose of permitting that obligation to be established in court only if suit is brought within the time as limited, and that it did not intend a mere restriction upon the recovery by suit of installments or portions of the benefits provided by the contract.

The provisions in Section 19 that the accrual of "the right" which starts the six-year limitation period running shall be deemed to be "the happening of *the contingency* on which the claim is founded" [italics ours] manifests, we think, an intention that the limitation period should run from the happening of the single contingency upon which reliance must be placed as having matured the policy; that there was no intention to bar merely the recovery of certain installments or portions of

insurance benefits with periods of limitations running from the date or dates of the happening of any contingency or contingencies occurring after the insurance had ceased. The terms "right" and "contingency" are each used in the singular. Also, it is obvious that no claim for insurance benefits could be founded on any contingency occurring after the insurance had ceased and, as stated above, the insurance ceases when the obligation of the contract arises at maturity.

That the contingency referred to in the statute is either the death or total permanent disability of the insured while the insurance is in force, is further shown by the provisions of Section 19 requiring a disagreement as a condition to the bringing of suit; defining "claim" and "disagreement"; authorizing the United States to bring suit in the nature of a bill of interpleader to determine the persons entitled to benefits when liability is admitted; and providing for the joinder in a suit brought by any claimant of "all persons having or claiming to have an interest in such insurance."

6. Until the decision in the instant case, it had been uniformly assumed (if not decided) by courts in passing on the six year limitation upon the consent to suit contained in Section 19 that a suit alleging maturity of the insurance by total permanent disability would be barred unless brought within six years from the alleged maturity. Indeed, in *Tyson*

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v. *United States*, 297 U. S. 121, the petition filed November 17, 1932, alleged that disability had existed ever since the claimant was discharged from the Army, December 18, 1918, and this Court stated (p. 123), in passing upon the question of limitations there involved: "Manifestly, suit was not begun within six years after the right accrued * * *." See also *Munro* v. *United States*, 303 U. S. 36. Similar assumptions have been expressed or are implied in decisions of the Circuit Courts of Appeals, including the Circuit Court of Appeals for the Seventh Circuit, and of the District Courts. See for example, *United States* v. *Craig*, 83 F. (2d) 361, rehearing denied, May 12, 1936; *United States* v. *Tarrer*, 77 F. (2d) 423, 425 (C. C. A. 5th), certiorari denied, 296 U. S. 574; *Stallman* v. *United States*, 67 F. (2d) 675 (C. C. A. 8th); *Roberts v. United States*, 66 F. (2d) 273 (C. C. A. 10th); *Wilson* v. *United States*, 70 F. (2d) 176, 179 (C. C. A. 10th); *Carson* v. *United States*, 37 F. (2d) 946 (D. C. Idaho); and *Baker* v. *United States*, 15 Fed. Supp. 982 (D. C. Idaho).

The Government's position with respect to the claim of the beneficiary is squarely supported by the decision in the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Tarrer*, 77 F. (2d) 423, 425, certiorari denied, 296 U. S. 574.

7. Finally, it is submitted, the provisions in question being limitations upon a waiver of the Government's sovereign immunity from suit, should be strictly construed in its favor.

II

Even if it were to be assumed that the court below is correct in its holding with respect to the limitations upon suits to recover disability benefits, it erred in disregarding the termination of the suspension of the limitations on the effective date of the administrative denial of respondent's claim in its computation of the number of installments of benefits payable.

ARGUMENT

I

RESPONDENT'S SUIT WAS NOT BROUGHT WITHIN THE PERIOD OF LIMITATIONS PRESCRIBED BY THE STATUTE GRANTING CONSENT TO SUE THE UNITED STATES UPON CLAIMS UNDER CONTRACTS OF WAR RISK INSURANCE

This suit was brought on June 29, 1936 (R. 1), to recover total permanent disability and death benefits under a yearly renewable term policy of war risk insurance on which no premiums were paid after the month of June 1919. The consent of the United States to be sued upon claims under such policies is granted by Section 19 of the World War Veterans' Act, 1924, as amended July 3, 1930,

supra, p. 2,[4] which provides that, in the event of "disagreement as to claim * * * under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States * * *." The section further provides, however, that no suit "shall be allowed * * * unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date * * *." And, in this connection, it is provided that "for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded," and that "this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director."

The period of one year after July 3, 1930, the date of "the amendatory Act," had long since expired when this suit was brought, and respondent's claim for benefits, filed in the Veterans' Administration on February 11, 1932, was not in time to suspend that limitation. The suit was, therefore,

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[4] Title III, World War Veterans' Act, relates entirely to war risk term and United States Government life insurance. Section 5, World War Veterans' Act, as amended (U. S. C., Title 38, Sec. 426), provides that "all decisions of questions of fact and law affecting any claimant to the benefits of Title * * * III * * * of this Act, shall be conclusive except as otherwise provided herein." The only exception thereafter appearing is found in the provisions of Section 19, *supra.*

obviously not in time under Section 19, unless saved by the six-year provision. Indeed this is, in effect, conceded in the opinion of the court below (R. 12).

It is submitted that the six-year period had also expired before respondent's suit was begun. Where, as here, liability on the part of the United States to pay any benefits to anyone under the policy is dependent upon the existence of total permanent disability while the policy was kept in force by premium payments, the six-year period within which the respondent must have brought suit, both as personal representative and as beneficiary, began to run, we contend, no later than the last day on which the policy remained in force by premium payments, i. e., in the instant case, July 31, 1919, when the grace period expired for the payment of the premium due July 1, 1919.[5]

1. Despite the express provisions of the statute which plainly show an intention to place a time limitation upon *suit,* the construction of the court below would provide no time limitation whatever upon *suits* by veterans for total permanent disability benefits under war risk insurance policies, but merely a limitation upon the *number of installments recoverable.* No limit is placed by the policies upon the number of installments payable during the total permanent disability of the insured and, therefore, suit could be brought at any time on any one of the several million policies which

[5] See footnote 1, *supra*, p. 5.

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were originally issued, so long as the veteran to whom any such policy was issued remains alive.[6] This would be true although the question as to whether the veteran is entitled to any installments under his insurance contract would be dependent upon whether he became totally permanently disabled while his policy was in force by premium payments, however far removed that date might be in the past.

The statement in the opinion of the court below (R. 13) that the obligation of the Government to pay total permanent disability benefits under a war risk term insurance contract is limited to the payment of two hundred forty installments, is contrary to the terms of the policy[7] when considered in the light of Section 402 of the War Risk Insurance Act, as amended by the Act of October 6, 1917 (Appendix, *infra,* pp. 40–41), under which the policy was issued. That section provides that payment shall be made "during total and permanent disability," and it is quite apparent that there was no intention to limit the number of installments thus payable, in view of the provision in the section that,

[6] Over four and one-half million of such policies were issued during the War, amounting to about forty billion dollars. *Lynch* v. *United States*, 292 U. S. 571, 576, footnote 2. According to the Annual Report of the Administrator of Veterans' Affairs for the year 1937, p. 65, less than 194,447 of these policies had at that time been eliminated, as possible bases for suit, by awards of benefits upon them.

[7] See Bulletin No. 1, Treasury Department, October 15, 1917, Appendix, *infra*, p. 42.

in making all calculations in connection with this insurance, "no deduction shall be made for continuous installments during the life of the insured *in case his total and permanent disability continues more than two hundred and forty months.*" [Italics ours.] The Act was so interpreted, with the full approval of the Bureau of War Risk Insurance, by Judge Julian W. Mack, in explaining its provisions at a conference of officers and enlisted men of the Army and Navy, held in Washington in October 1917, immediately after the publication of the terms of the contract. (See Bulletin No. 3, Treasury Department, October 16, 1917, Appendix, *infra,* pp. 43–54.)

Moreover, under the court's construction of the limitation provisions, in their application to disability cases, as precluding merely a recovery by suit of certain installments, new suits may be brought by veterans, if living, in all cases in which prior suits have been held barred by the limitation provisions, including cases decided by this Court (*Tyson* v. *United States,* 297 U. S. 121; *Munro* v. *United States,* 303 U. S. 36).

2. The construction adopted by the court below is also at variance with an essential purpose of the statute to protect the Government against suits on stale claims. The court states, in substance, that Congress had no intention, by enacting the provisions in question, of barring suits on stale but meritorious claims (R. 15); that such an intention would have been inconsistent with the liberal purpose which runs throughout all the statutes relating

to the enforcement of claims for insurance benefits under war risk term policies. It is no doubt true that when, on May 29, 1928, Congress enacted the six-year limitation to take the place of the statutes of limitations of the various States for the primary purpose, stated in the Committee Reports, of providing uniformity, it was also actuated in part by a liberal purpose, since it provided one year from the date of that enactment within which suit might be brought on all claims, thus permitting many suits to be brought which otherwise would have been barred. (See *United States* v. *Sligh,* 24 F. (2d) 636 (C. C. A. 9th), and see Committee Reports which accompanied the Act of May 29, 1928, containing the original limitation provisions, Appendix, *infra,* p. 45.) However, there was clearly no intention to remove all the limitations upon suits in the enormous class of potential claims by veterans for total permanent disability benefits—a result which would follow if the interpretation of the court below were given effect.

On the contrary, when the original limitation provisions were enacted by the Act of May 29, 1928 (Appendix, *infra,* pp. 44–45). Congress was presumably aware that no premiums had been paid since the War on more than three million policies;[8] that every suit to recover benefits under such policies would involve as its principal issue the

[8] See *Lynch* v. *United States,* 292 U. S. 571, 576, footnote 2.

question of whether the insured was totally and permanently disabled prior to a date, at least as early as 1919, when the policy would otherwise have expired for nonpayment of premiums; and that, if an indefinite period were thereafter allowed for suit, it would be difficult, and in many cases impossible, to prepare and present a proper defense by reason of the loss of memory, death, or removal of witnesses, or loss of records. Approximately nine years had already passed when the Act of 1928 was enacted, and it would seem at least doubtful that Congress intended to impair further the Government's ability to defend itself against claims based on an alleged maturity of insurance lapsed for more than six years by allowing a longer time for suit than the one-year period after the date of the Act for which provision was made in Section 19. In this connection the Circuit Court of Appeals is in error, we submit, in construing the six-year limitation for filing suit as intended to relieve against hardships resulting from the fixing of the arbitrary date of one year after the passage of the Act (R. 15). It is submitted that the correct interpretation is just the reverse. The one-year provision was intended to relieve from the hardship which would have resulted if the six-year limitation were alone enacted, since it was then more than six years since any premiums had been paid on most of the war risk term insurance policies, and suits on all such policies would have been barred under the six-

year clause unless the one-year clause had been included.

Also, there would seem to be no justification for a construction of the statute such as that adopted by the court below, which would have the effect of barring suit as to some installments of disability benefits, but not as to others. All installments are in the same status with respect to the difficulty of the Government in making its defense since, as previously stated, the principal fact in issue as to all is the existence of total permanent disability while the policy was in force by premium payments. There would seem no basis for thus protecting the Government against suit as to part of a stale claim, and leaving it open to suit as to the rest.

Furthermore, the limitation provisions, as construed by the court below, would, in reality, not restrict even the number of installments ultimately recoverable. If the plaintiff should recover a judgment for any installments, the maturity of the insurance would be thereby necessarily established, and the Veterans' Administration, being subject to no time limitation on the claims considered by it, would presumably pay any installments barred from recovery by suit, if they were claimed. In *United States* v. *Worley*, 281 U. S. 339, this Court held that the judgment should not include installments maturing after the suit was brought, but stated that (p. ~~941~~ 341)—

> Undoubtedly, when one's right to recover is established by judgment, the Veterans' Administration will pay him installments maturing in his favor after the commencement of the action.

Pursuant to the view thus expressed by this Court, it has been the consistent administrative practice to pay installments, not embraced in a judgment, which have accrued subsequent to the bringing of suit, so long as the plaintiff remains totally and permanently disabled. The plaintiff's right to installments maturing prior to the commencement of an action is as well established, at least from an administrative standpoint, by judgment in his favor as is his right to those maturing thereafter. It is for this reason, no doubt, that the Solicitor of the Veterans' Administration held (Ops. Sol., V. A. Vol. 36, p. 439, Appendix, *infra,* pp. 45–48) that where the beneficiaries had obtained a judgment for death benefits based upon a finding that the insurance matured by total permanent disability while it was in force by premium payments, the accrued disability benefits of that insurance were payable to the administrator of the insured's estate, although he was not a party to the suit and was not mentioned in the judgment.

Thus, however long delayed the plaintiff's suit might be, the net result of the construction of the statute adopted by the court below would be merely to penalize him to a certain extent by requiring him to take further steps, after obtaining a judgment

for part of his claim, in order to recover the balance.

3. Under the interpretation of the court below, it would be possible for a beneficiary to bring suit as long as twenty-six years after the date of the total permanent disability alleged as the basis for such suit.[9] It would seem reasonable to assume that Congress considered that the Government was as much in need of protection against a suit by a beneficiary based on an allegation of total permanent disability of the insured many years in the past, as of protection against suit by an insured based on an allegation of total permanent disability likewise many years in the past.

Moreover, there is no apparent reason why the beneficiary should be given the privilege of bringing suit upon a claim based upon the total permanent disability of the insured after the insured himself has lost the privilege of asserting his claim in court based upon the same contingency. *United States* v. *Tarrer,* 77 F. (2d) 423 (C. C. A. 5th), certiorari denied, 296 U. S. 574. The beneficiary is merely a "volunteer." His rights are derived

[9] If the insured died just before the expiration of twenty years after the lapse of the policy, the beneficiary could, within six years thereafter, sue for the 240th installment. And, since the recovery of that installment would establish the maturity of the contract, the other 239 installments, non-recoverable by suit, would then be subject to administrative payment to the administrator of the estate of the insured, in which payment the beneficiary might share as next of kin. See pages 24–25, *supra.*

from the insured, since he owes them to the gratuitous designation of him as beneficiary by the insured. The insured may change the beneficiary at any time. And, even after the death of the insured, his rights under the policy may be taken from him by Congress and given to others. *White* v. *United States,* 270 U. S. 175. The fact upon which the court below relies (R. 13) that the benefits sought by the respondent as beneficiary did not become payable *to him* in his individual capacity until after the death of the insured, has no significance, we submit, with regard to when the limitation provisions began to run against suit by him in that capacity. In this respect, his position is obviously no different from his position as administrator. The benefits sought by him as administrator did not become payable to him until after the death of the insured, but, admittedly, limitations began to run against him prior to that date.

4. The very nature of the Government's obligation under the yearly renewable term insurance contract indicates, we think, that Congress intended the six-year limitation to run from the date of the happening of the contingency which is relied upon as having matured the contract.

Both the contract (Bulletin No. 1, Bureau of War Risk Insurance,[10] Appendix, *infra,* pp. 41–42)

[10] This bulletin was issued by the Director of the Bureau of War Risk Insurance, pursuant to authority contained in Section 402, War Risk Insurance Act (Appendix, *infra,* p. 40).

and the statute under which the contract was issued (Section 400, War Risk Insurance Act, Appendix, *infra*, p. 40) provide insurance against the happening of either total permanent disability or death. When either of these contingencies, against the happening of which the insurance is granted, occurs while the insurance is in force, the insurance itself ceases, since there is substituted for it the matured obligation on the part of the Government to pay the benefits of the insurance, according to the terms of the contract. This is apparent since Bulletin No. 1, *supra*, provides for the payment of the benefits of the contract upon the happening of either of the two contingencies insured against, i. e., death or total permanent disability. "Total permanent disability * * * is as much insured against as death." *Boyett* v. *United States*, 86 F. (2d) 66, 68 (C. C. A. 5th). The insurance is for a principal amount, although the method of its payment is by monthly installments, "the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ per cent per annum." (Bulletin No. 1, Appendix, *infra*, p. 42.) If the principal amount of the policy were payable in one sum, it could scarcely be seriously urged that limitations would run from any date subsequent to the maturity of the obligation and, we submit, the mere fact that it is provided that the obligation be discharged by payment in monthly installments does

not alter the nature of the obligation itself, nor change the date from which limitations logically should run, and evidently was intended by Congress to run. We submit that, since the obligation of the Government to pay the benefits provided by the contract, according to its terms, arises when either of the contingencies insured against occurs, it is the right to the benefits of the contract which arises correlative to this obligation of the Government to pay them, which Congress had in mind when it provided that limitations should begin to run when the "right accrued for which the claim is made," and that it was not concerned in that connection with variations among individual cases with respect to the method of payment of the obligation, the persons to whom payments are to be made, or the amounts payable to each.

In effect, the court below has conceded that the Government's interpretation of the provision in question would be clearly correct, at least as to disability benefits, if the amount payable were determinable on the date of maturity by disability, because it states "It is clear * * * that if the disability benefit consisted of a determinable amount * * * the 'happening of the contingency on which the claim was founded' would be the inception of the condition of total and permanent disability" (R. 14). But, since the obligation arises at that time to pay all of the benefits provided by the terms of the contract, whatever they may be,

and to whomever they may be payable, we submit that the lack of determinability of the amounts to be paid or the persons to receive them is wholly immaterial with respect to the time when the limitation begins to run. In this connection, it appears significant that, although the court below held that the limitation upon suit by a beneficiary begins to run from the date of death, the amount payable to a beneficiary at death is likewise not determinable.[11]

5. We submit that Congress enacted the limitation provisions in Section 19, *supra*, and indeed the other provisions of that section, in recognition of the single obligation of the insurance contract, and for the purpose of permitting that obligation to be established by suit only if suit is brought within the time specified, and that it did not contemplate, as it might have done, a mere restriction upon the recovery by suit of installments or portions of the benefits provided by the contract.

That Congress, in providing that no suit shall be allowed unless brought within six years "after the right accrued for which the claim is made," intended that limitations should run from the happening of the single contingency upon which reliance must be placed as having matured the policy (i. e., death or total permanent disability while the insurance was in force), and to bar the recovery of any benefits after the expiration of the period specified, computed from a single date, and that it did not in-

[11] See footnote 2, *supra*, p. 7.

tend to bar merely the recovery of certain installments or portions of the insurance benefits by periods of limitations running from the date or dates of the happening of any contingency or contingencies occurring after the insurance had ceased, is made manifest, we think, by the provision that "it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded." This is true, we think, because the term "right" and "contingency" are both stated in the singular. Also, obviously, no claim for insurance benefits can be founded on any contingency occurring after the insurance has ceased and, as stated above, the insurance ceases when the obligation of the contract arises at maturity.

The requirement in Section 19 that a disagreement be obtained as a condition to the bringing of suit, and the definition of "claim" and "disagreement," also contained in that section, indicate clearly, we think, that the contingency on which any claim is founded, within the meaning of the limitation provisions, is either the death or permanent and total disability of the insured while the insurance is in force, and, of these two possible contingencies, is the one on which reliance must be placed as having matured the insurance and created the liability of the Government to pay benefits under the contract.

The obvious purpose of the disagreement requirement is to avoid suit in those cases in which it

may be determined administratively that while the insurance was in force the insured became totally permanently disabled or died. Congress could not have been unaware that practically every suit under Section 19, *supra*, in which the United States is the defendant, is the result of disagreement as to a claim that total permanent disability occurred while the insurance was in force, since the happening of death is seldom a fact disputed, and the statute itself provides that, if liability is admitted and there is dispute merely as to the person or persons entitled, the United States is authorized to bring suit in the nature of a bill of interpleader. (Supra, p. 3.)

Section 19 defines the terms "claim" and "disagreement" in these words:

> The term "claim" as used in this section means any writing which alleges permanent and total disability at a time when the insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term "disagreement" means a denial of the claim * * *.

The interpleader provision discloses that Congress expected every insurance contract to be paid in full, without suit, when death or total permanent disability was found to have occurred, unless there was dispute as to the person or persons entitled, and that, in the latter cases, the United States would initiate the proceedings necessary to settle the controversy with respect to admitted liability.

The definition of "claim" and the requirement of a disagreement as to claim as a condition to suit shows that Congress obviously anticipated that a claimant would allege death or total permanent disability occurring while the insurance was in force, and that the Bureau would consider whether either of these contingencies had occurred at such time. Therefore, Congress must have considered that the happening of the one or the other of these two contingencies, according to the one upon which reliance must be placed as maturing the insurance contract, would constitute "the contingency on which the claim is founded" within the meaning of the limitation provisions likewise contained in Section 19. Thus, in the instant case, the beneficiary could have made a valid claim under the foregoing definition without reference to any other contingency than alleged "permanent and total disability at a time when the insurance was in force," which shows that Congress intended permanent and total disability, and not death, to be regarded as the contingency on which the claim is founded in such a case.

Also consistent with the foregoing views is the provision of Section 19 that where suit has been brought "all persons having or claiming to have an interest in such *insurance* may be made parties to such suit." [Italics ours.] If, as held in effect by the court below, a suit under Section 19 is limited to determining merely the obligation of the Govern-

ment with respect to installments or to a portion of the benefits of an insurance contract, with differing periods of limitation according to the installment or the portion, the recovery of which is sought by suit, the provision for joinder logically should have been restricted to those persons having or claiming to have an interest in the installments or portion of insurance benefits sought to be recovered in the suit.

It has been held that, where there has been a disagreement as to a claim by a beneficiary that insurance has matured by total permanent disability and suit has been brought by the beneficiary, the administrator of the estate of the insured, having an interest in such *insurance,* was entitled to join in the suit without the necessity of filing in the Veterans' Administration a separate claim and obtaining a separate denial. *Coffey* v. *United States,* 97 F. (2d) 762 (C. C. A. 7th). It has also been held, where there has been a disagreement as to a claim that insurance matured by total permanent disability and suit was timely brought by the administrator, persons claiming as beneficiaries of that insurance might be joined as parties to that suit, although the time as of which they were joined was subsequent to the date as of which a separate suit might be brought by such beneficiaries. *United States* v. *Powell,* 93 F. (2d) 788 (C. C. A. 4th); *United States* v. *Tate,* 99 F. (2d) 307 (C. C.

A. 4th). Cf. *Marsh* v. *United States*, 97 F. (2d) 327 (C. C. A. 4th). These decisions recognize the intention of Congress, in the enactment of the joinder provision, to treat the obligation of the insurance contract as a single obligation and, if Congress intended to treat the obligation as single for the purpose of the joinder provision, it seems reasonable to assume that it intended, as the Government contends, to treat the obligation as single for the purpose of the limitation provision contained in the same section.

6. Until the decision in the instant case, it had been uniformly assumed (if not decided) by the courts, in passing on the six-year limitation upon the consent to suit embodied in Section 19, *supra*, that a suit alleging maturity of the insurance by total permanent disability, to be allowed at all, must have been brought within six years from such alleged total permanent disability while the insurance was in force. In *Tyson* v. *United States*, 297 U. S. 121, a petition filed November 17, 1932, alleged the disability had existed ever since the claimant was discharged from the Army, December 18, 1918, and this Court stated (p. 123), in passing upon the question of limitations there involved: "Manifestly, suit was not begun within six years after the right accrued * * *." See also *Munro* v. *United States*, 303 U. S. 36. Similar assumptions have been expressed or are implied in decisions of

the Circuit Courts of Appeals, including the Circuit Court of Appeals for the Seventh Circuit, and of the District Courts. See for example, *United States* v. *Craig*, 83 F. (2d) 361, rehearing denied, May 12, 1936; *United States* v. *Tarver*, 77 F. (2d) 423, 425 (C. C. A. 5th), certiorari denied, 296 U. S. 574; *Stallman* v. *United States*, 67 F. (2d) 675 (C. C. A. 8th); *Roberts* v. *United States*, 66 F. (2d) 273 (C. C. A. 10th); *Wilson* v. *United States*, 70 F. (2d) 176, 179 (C. C. A. 10th); *Carson* v. *United States*, 37 F. (2d) 946 (D. C. Idaho); and *Baker* v. *United States*, 15 Fed. Supp. 982 (D. C. Idaho).

The Government's position with respect to the claim of the beneficiary is squarely supported by the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *Tarver*, 77 F. (2d) 423, 425, certiorari denied, 296 U. S. 574, *supra*, where it was held, upon facts substantially similar to those in the instant case, that the "contingency" on which the claim of a beneficiary under a war risk term insurance contract was founded, which starts the running of the limitation against suit, was "not the death of the insured in 1930, but his total and permanent disability at the time the policy lapsed in 1919;" and that no other limitation applied to the beneficiary's claim than applied to that of the insured. Moreover, until the decision in the instant case, there was no final holding of any court construing the provisions of Section 19, *supra*, con-

trary to the interpretation embodied in the *Tarver* case, *supra*.

7. Finally, we submit that since the provisions here in question relate to a limitation upon a waiver of the sovereign immunity to suit, they should be strictly construed in the Government's favor. *United States* v. *Michel*, 282 U. S. 656, 660; *Kemp* v. *United States*, 77 F. (2d) 213 (C. C. A. 7th); *United States* v. *Valndza*, 81 F. (2d) 615, 617 (C. C. A. 6th); *United States* v. *Arditto*, 86 F. (2d) 787, 788 (C. C. A. 6th); *Fletcher* v. *United States*, 92 F. (2d) 713, 717 (Ct. Cus. & Pat. App.).

II

THE COURT BELOW ERRED IN DISREGARDING THE TERMINATION OF THE SUSPENSION OF THE LIMITATIONS ON THE EFFECTIVE DATE OF ADMINISTRATIVE DENIAL OF RESPONDENT'S CLAIM IN ITS COMPUTATION OF THE NUMBER OF INSTALLMENTS OF BENEFITS PAYABLE

Even if it were to be asssumed that the Circuit Court of Appeals is correct in its holding that the statute of limitations did not begin to run as to any installment until the installment accrued, it erred in holding that the bar of the statute was ineffective as to any installment which accrued within six years prior to the filing of the claim for benefits in the Veterans' Administration on February 11, 1932. It is submitted that this holding is contrary to the provisions of Section 19 of the World War Veterans' Act, 1924, as amended (*supra*, p. 4). This section provides a suspen-

sion of limitations only for the period "between the filing in the bureau of the claim sued upon and the denial of said claim." Thus the statute clearly contemplates a resumption of the running of limitations upon the effective date of the administrative denial of the claim.[13] The court, however, ignores this fact. It states (R. 14–15):

> On February 11, 1932, the running of the statute of limitations was suspended since on that date the administrator filed his claim for installments for total permanent disability benefits which had become due up to the date of the death of the insured. Consequently, the bar of the statute was not effective as to any installments payable within six years prior to February 11, 1932, and before the death of the insured; therefore, the administrator had a valid enforcible claim for all monthly installments of disability benefits which accrued during the period from February 11, 1926, up to and including the date of death of the insured, April 22, 1927.

Since the claim was denied on August 8, 1935 (R. 3), and suit was not filed until June 29, 1936 (R. 1), there was a period of 326 days, subsequent to the termination of the suspension during which

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[13] Section 404 of the Act of June 29, 1936, c. 867, 49 Stat. 2034 (38 U. S. C. 445d), which provides a minimum period of ninety days from the effective date of denial within which to sue, has no bearing in this connection, since the suit was brought subsequent to the expiration of this ninety-day period.

limitations again ran. Consequently, even under the court's interpretation of the statute, there was a period of nearly eleven months during which the statute was not suspended and during which there would have been lost any right to the recovery of approximately eleven of the monthly installments which the court stated are recoverable.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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W. MARVIN SMITH,
Attorney.

DECEMBER 1938.

APPENDIX

The first authority to grant war risk insurance was that contained in the Act of October 6, 1917, c. 105, Sec. 2, 40 Stat. 399, 409–410, amending the War Risk Insurance Act by adding the following sections, among others:

> SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided.
>
> SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable, and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them.

The insurance shall be payable in two hundred and forty equal monthly installments. Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. All calculations shall be based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months.

Bulletin No. 1 (Regulations and Procedure, U. S. Veterans' Bureau (1930), Part II, pp. 1233, 1235) was promulgated by the Director of the Bureau of War Risk Insurance, Treasury Department, on October 15, 1917, and provides, in part, as follows:

THE UNITED STATES OF AMERICA, TREASURY DEPARTMENT, BUREAU OF WAR RISK INSURANCE

Under the authority granted by Congress in an act * * * and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under au-

thority of the act, shall constitute the contract:

Hereby insures from and after the day of , 19 , John Doe, * * * conditioned upon the payment of premiums as herein provided, for the principal amount of $5,000 converted into monthly installments of $28.75 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ per cent per annum), payable—

To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability; and

To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the insured, while the insurance is in force, and (except as otherwise provided) continuing for 240 months if no installments have been paid for total and permanent disability or if any such installments have been paid, then for a number of months sufficient to make 240 in all:

* * * * *

Unless other designation is made by the insured, such person or persons, within the permitted class of beneficiaries, as would under the laws of the place of residence of the insured be entitled to his personal property in case of intestacy shall be deemed designated as the beneficiary or beneficiaries to whom shall be paid any installments remaining unpaid upon the death, or disqualification under the provisions of the act, of any named beneficiary.

Bulletin No. 3 (Regulations and Procedure, U. S. Veterans' Bureau (1930), Part II, pp. 1241, 1258, 1259), was promulgated by the Director of the Bureau of War Risk Insurance, Treasury Department, on October 16, 1917, and provides, in part, as follows:

> Explanation submitted by Hon. Julian W. Mack of the provisions of the military and naval insurance act, presented at a conference of officers and enlisted men of the Army and Navy, held in Washington on October 16, 17, and 18, 1917. This explanation has the full approval of the Bureau of War Risk Insurance.
>
> WILLIAM C. DE LANOY,
> *Director.*
>
> Approved:
> W. G. MCADOO,
> *Secretary of the Treasury.*

SCOPE AND MEANING OF ACT OF OCTOBER 6, 1917, PROVIDING FOR FAMILY ALLOWANCES, ALLOTMENTS, COMPENSATION, AND INSURANCE FOR THE MILITARY AND NAVAL FORCES OF THE UNITED STATES

Hon. JULIAN W. MACK.

Hon. JULIAN W. MACK. Mr. Chairman and gentlemen, * * *

* * * * *

Now, in its solicitude for the men and for the families, and acting—and properly acting—in a somewhat paternal manner, the Government has provided that you can not get this insurance paid out in a lump sum, and that your family can not get this insurance paid out in a lump sum. It is not only free from creditors, but it is going to be paid

out only in monthly installments over a period of 20 years, which means 240 monthly installments. If, however, you become totally disabled and the total disability continues more than 20 years, the same monthly installments will be kept up for you as long as the disability continues.

Treasury Decision 45 (Regulations and Procedure, U. S. Veterans' Bureau (1930), Part I, p. 18), promulgated by the Director of the Bureau of War Risk Insurance, Treasury Department, on May 17, 1919, provided in part as follows:

> 1. When any person insured under the provisions of the war risk insurance act leaves the active military or naval service for reasons not precluding the continuation of insurance, the monthly premium which, had he remained in the service, would have been payable on the last day of the calendar month in which he was discharged will be payable on the first day of the calendar month following the date of his discharge, and thereafter monthly premiums shall be payable on the first day of each calendar month. The premium payable on the first day of any calendar month may, however, be paid at any time during such month, which shall constitute a grace period for the payment of such premium. If the premium is not paid before the expiration of such grace period the insurance shall lapse and terminate.

Section 19 of the World War Veterans' Act, 1924, was amended by the Act of May 29, 1928, c. 875, 45 Stat. 964, by adding the following:

> No suit shall be allowed under this section unless the same shall have been brought within six years after the right accrued for

> which the claim is made, or within one year from the date of the approval of this amendatory Act, whichever is the later date: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That the limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * * No State or other statute of limitations shall be applicable to suits filed under this section. This section shall apply to all suits now pending against the United States under the provisions of this section.

In the House Committee Report (70th Cong., 1st Sess., H. Rep. 1274, p. 1) accompanying the bill which became the Act it is said:

> 1. Section 1 of the bill amends section 19 of the act by establishing a uniform statute of limitations for suits on contracts of insurance. At the present time, under the conformity act, the statutes of limitations of the various States apply. The periods of limitations in these statutes vary from 3 to 20 years, the average being 6 years. The committee believes that the average statute of limitation, namely, six years, should be applied to these suits, with an additional year from the date of passage of this amendatory act for all suits. * * *

The same statement is contained in the Senate Committee Report (70th Cong., 1st Sess., S. Rep. 1297, p. 1).

The Solicitor of the Veterans' Administration rendered the following opinion pursuant to the re-

quest of an Assistant Administrator on February 8, 1938:

DUCKWORTH, Benjamin Franklin
XC-843,505

You request an opinion as to whether insurance benefits may be paid to the estate of the insured veteran where a judgment was rendered finding that the deceased veteran was permanently and totally disabled from May 22, 1919, a date while his insurance was in force, to the date of his death, June 8, 1921, and where the judgment awards benefits only to the designated beneficiaries.

The pertinent facts of the case are that the veteran while in the military service duly applied for $10,000.00 yearly renewable term insurance, designating his sister, Vira Bryan (whose full name appears to be Mrs. Selina Elvira Bryan) and his brother, Robert Martin Duckworth, as beneficiaries, each in the amount of $5,000.00; he was discharged from the Service May 22, 1919, and his insurance lapsed for nonpayment of premium due June 1, 1919. He died June 8, 1921, when no insurance was in force.

The veteran's sister filed application for insurance benefits, alleging that the veteran became permanently and totally disabled during his military service. No decision was rendered on her claim. However, a letter was addressed to her under date of April 4, 1933, advising that in view of the provisions of the Act of March 20, 1933, favorable consideration of her claim for said insurance was barred and no further action could be taken by the Veterans' Administration.

Thereafter, the designated beneficiaries filed suit in the United States District Court for the Western District of Louisiana

against the Government on claims for said insurance. Judgment was entered by the Court on April 14, 1937. The adjudicating paragraph

"It is Ordered, Adjudged, and Decreed, First, That Benjamin Franklin Duckworth was totally and permanently disabled from and after May 22, 1919, to date of his death June 8, 1921.

"Second: That plaintiffs, Mrs. Elvira (sometimes called Vera) Bryan and Robert Martin Duckworth, do have and recover from the defendant, United States of America, for all of the monthly installments of Fifty-Seven and 50/100 ($57.50) Dollars or Five and 75/100 ($5.75) Dollars per month for each One Thousand and no/100 ($1,000.00) Dollars of insurance, accruing from and after June 8, 1921, in the proportion of Five Thousand and no/100 ($5,000.00) Dollars to Mrs. Elvira Bryan and Five Thousand and no/100 ($5,000.00) Dollars to Robert Martin Duckworth.

"Third: It is further ordered, adjudged and decreed that the defendant, United States of America, deduct ten per centum (10%) of the amount of insurance sued upon and involved in this action and pay the same to Edward L. Gladney, Jr., as counsel for said plaintiffs for his services rendered before this court, payable at the rate of ten (10%) per cent of all payments due on account of said insurance as provided by law."

Insurance benefits were awarded Mrs. Elvira Bryan and Robert Martin Duckworth as designated beneficiaries, commencing June 22, 1921, and ending May 21, 1939, the end of the 240-month period from May 22, 1919, the date on which the judgment finds that the veteran became permanently and

totally disabled. Ten percent of the amounts granted by the judgment has been awarded to the attorney of record.

It appears from your memorandum that no benefits have been awarded the estate of the deceased veteran from the date of permanent total disability as fixed by the judgment to the date of his death.

The judgment determines the date of permanent total disability as of a time prior to the date the right of the beneficiaries had its inception, and of a date while the insurance was in force and effect. In my opinion, if a claim is duly made, the installments of insurance accruing from the date of permanent total disability to the date of death of the veteran should be paid to the personal representative of the veterans' estate.

You also request to be advised if an attorney's fee is payable out of the accrued installments of insurance due the estate of the veteran. The Department of Justice has advised that a fair and reasonable construction to be placed upon such judgments is that the attorney is entitled to 10% of all payments made as the result of the judgment (Let. of Asst. Atty. Gen. to this Office January 25, 1929, quoted in case of Gustav H. Johnson, XC-491,185).

It is my opinion that the attorney of record in this case is entitled to 10% on the accrued installments due the veterans' estate, for the reason that it was through his efforts the judgment was entered under which certain installments of insurance are payable to said estate.

JAMES T. BRADY.

U. S. GOVERNMENT PRINTING OFFICE: 1930

INDEX.

ARGUMENT.

CITATIONS
CASES

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938

No. 360

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

CHARLES F. TOWERY, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF

OPINION BELOW.

Towery v. *U. S.*, 97 F. (2d) 906.

STATEMENT.

A misapprehension in petitioner's statement as to the basis of the decision being reviewed should be corrected.

The opinion below was not that the insured was entitled to 240 installments only, nor that the named beneficiary was entitled to any definite number of installments, but the court was dealing with the rights of the parties to this particular case, where the insured had died before maturity of the entire 240 installments and where the named beneficiary is still living. Therefore, the court saw no necessity to state that under other circumstances, here immaterial, an insured who remained totally and permanently disabled more than 240 months would continue to be entitled to benefits thereafter, nor that upon the death of a named beneficiary before the maturity of all death benefit installments, the then commuted value of the unmatured balance of death benefits would then be payable at once to the estate of the insured as successor beneficiary.

Petitioner errs, however, in its footnote statement (Bf. 8) that no basis exists for a distinction between the beneficiary and the insured or his personal representative as to the determinability of the amounts payable. The distinction is that it can never be determined in advance whether anything more in disability benefits will ever accrue or become payable to anybody, whereas death of the insured makes it certain that the unmatured balance of the 240 installments will become payable as death benefits to the named beneficiary or his successor. The fact that the successor will be the administrator of the insured instead of the administrator of the beneficiary does not make the obligation any more uncertain than it would be if the law provided that the unpaid installments should go to the administrator of the beneficiary, and the provision for immediate payment of the commuted value would not render the obligation uncertain any more than the negotiability of an interest bearing note payable in installments on or be-

fore the first of each month would be destroyed by the possibility that the maker might pay the entire principal at any time and thereby lessen the amount of interest that the holder would receive. However, even if petitioner's assertion that there is no basis for distinction is sound, it is entirely immaterial here, as it would merely give the instant beneficiary an unneeded longer limitation period as to some of the installments.

SUMMARY OF THE ARGUMENT.

I.

(a) Six year limitation as to claim of beneficiary runs only from death of insured, not from happening of total permanent disability.

(b) A separate six year limitation as to each installment of total permanent disability benefits runs only from the due date of such installment.

II.

As all installments maturing on or after October 3, 1926, were recoverable free from the limitation bar, the reversal of the District Court judgment was proper.

ARGUMENT.

I.

(a) When the insured died, April 22, 1927, his insurance was still in force and effect if he became totally and permanently disabled during the period for which premiums had been paid or within the grace period thereafter. If he had lived he would have had by statute (Sec. 19 World War Veterans' Act 1924 as amended, Secs. 445 and 445d, Tit. 38, USCA) until July 3, 1931, in which to file his claim with the Veterans' Administration for total permanent disability benefits, and, to institute suit therefor, an additional period depending on the delay of the Veterans' Administration in passing on his claim. He therefore still had a valid existing contract of insurance at the time of his death, and if the administrator and beneficiary had filed a claim for total permanent disability and death benefits, respectively, before August 15, 1930, beyond question the suit would not have been barred by the statutory limitation period of one year from July 3, 1930, or six years after the right accrued for which the claim is made, whichever is the later date, under the statutory definition that the right shall be deemed to have accrued on the happening of the contingency on which the claim is founded. The trouble with this statutory definition is that it does not define anything, but itself is in need of definition just as much as the term which it purports to define. It has served, therefore, only to confuse instead of to clarify. There are, of course, several contingencies that must have happened in order to give a beneficiary any valid

claim whatever. (1) Insurance must have been applied for and granted while the insured was in the army. (2) The insured must have become totally and permanently disabled, or died, while the policy was in force. (3) The beneficiary must have been designated as such by the insured and have continued to be such duly designated beneficiary until the death of the insured. (4) The insured must have died. If one of these contingencies has failed to happen the alleged beneficiary has never acquired any valid claim. In that sense, any one of these contingencies might be taken as the contingency upon which the claim was founded as well as any of the others. However, it would seem logical to hold that the happening of the contingency on which the claim of the beneficiary is based, which made his cause of action accrue, was the happening of that one of the contingencies which gave him an existing immediate right to demand and be paid insurance benefits, and not merely the happening of some contingency which only created a possibility that said beneficiary might at some time in the future acquire such a claim. So construing the statute, the right of the beneficiary could never accrue until death of the insured and it would be wholly immaterial whether the insurance was kept in force until that death by payment of premiums or by total permanent disability commencing during the period for which premiums were paid. The beginning of total permanent disability could, of course, give no immediate right of action to the beneficiary and, in fact, no right of action at all, because until the death of the insured the beneficiary could make no valid claim for payment of insurance benefits and no such benefits could lawfully be paid to *him*, and, indeed, there would be no assurance that *he* would ever have any such valid claim, for he might die before the insured or the insured might file a change

of beneficiary which would substitute an entirely different person as beneficiary, or by collecting 240 monthly installments of disability benefits the insured might terminate the provisions of the insurance contract for payment of death benefits.

It is an almost axiomatic principle of law that a statutory limitation can never commence to run against a cause of action until there is a person capable of presenting such cause of action for enforcement to some official or tribunal (judicial or administrative) having power to pass upon the claim.

There is an exact parallel, so far as the limitation provisions are concerned, between the claim of a war risk insurance beneficiary and a death claim under the Federal Employer's Liability Act (Sec. 56, Tit. 45 USCA; c. 149, Sec. 6, 35 Stat. 66; c. 143, Sec. 1, 36 Stat. 291), which provides that "no action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." True, in the former the limitation provision does, and in the latter does not, contain the meaningless attempt at definition to the effect that the cause of action shall be deemed to have accrued upon the happening of the contingency upon which the claim is based, but that adds nothing to the word as it stands without definition, and it has been decided that the cause of action for death under said Liability Act does not accrue until death, regardless of the time intervening between injury and death.

B. & O. S. W. R. Co. v. *Carroll*, 280 U. S. 491, 494-5.

By analogy the following decision is applicable also:

"A different construction of the statute would lead to the anomalous result that an owner of land whose title appeared to be unquestioned would be

> prevented from recovering it if he did not bring suit within seven years after he acquired title against persons who during such seven years had neither asserted any claim to the land nor held adverse possession of it nor otherwise invaded his rights, that is, that his suit would be barred before any cause of action had accrued on which he could have brought suit. This, manifestly, was not intended."
>
> *Grayson* v. *Harris*, 279 U. S. 300, 304-5.

The opinion of the Court of Appeals in the instant suit states hypothetical cases showing the absurdity of petitioner's theory that the happening of the contingency on which the claim of the beneficiary is based is the beginning of total permanent disability instead of death. A few additional examples will still further emphasize that absurdity and show that such theory would in some cases bar a claim by limitation even before its maturity. For instance, suppose an insured had become totally and permanently disabled January 1, 1925, had filed his claim and had it allowed July 1, 1925, and the government had continued to pay him total permanent disability benefits to and including August 1, 1931, but on September 1, 1931, had refused to pay any further disability benefits and had notified him of such refusal alleging as reason therefor that he was no longer totally and permanently disabled. If he died thereafter on the same September 1, 1931, the claim of the beneficiary, according to the government's theory, would be barred before it became a claim, for more than six years had elapsed between the beginning of total permanent disability and the date of death and that death occurred after July 3, 1931. If we add another element to such hypothetical facts and assume that there was a change of beneficiary August 1, 1931, the claim of such new beneficiary according to the government's theory, would be

barred even before *he* was designated as a beneficiary, notwithstanding it was the privilege of the insured to make a change of beneficiary whenever desired. If we vary the facts in either of those examples to assume that the insured died August 3, 1931, without any refusal of payment having been made and that the beneficiary filed *his* claim on the same day for death benefits, the theory of the government would still bar the latter claim. It is not to be supposed that Congress intended any such absurd result. The government's theory simply will not work logically, but the theory that when the insured had an enforceable contract of insurance at the time of his death only such death starts the limitation period running against the beneficiary will work out logically in every case and will not conflict with the usual principles applying to statutes of limitations. According to the ordinary rules of statutory construction, a statute will be construed so as to give it a reasonable, logical meaning which will avoid hardship, rather than an absurd or illogical meaning or one which will create hardship.

> "Nothing is better settled than that statutes should receive a sensible construction such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion."
>
> *In re* Chapman, 166 U. S. 661, 667.
> *Lau Ow Bew* v. *U. S.*, 144 U. S. 47, 59.

> "Where a particular construction of a statute will occasion great inconvenience or produce inequality or injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute."
>
> *Knowlton* v. *Moore*, 178 U. S. 41, 77.

> "If there are no means of avoiding such an interpretation of the statute, a judge must come to

the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an Act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended."

Plumstead B. of W. v. *Sprackman,* L. R. 13 Q. B. D. 878, 887.

We see no reason for treating war risk insurance contracts differently, in considering the limitation period for suit thereon, from any other installment contract, and the rule is well settled that in other contracts the limitation begins to run as to each installment from the due date of that installment and not from the due date of the first installment, even where the liability is a fixed one as to all installments and not contingent.

Pac. M. L. I. Co. v. *Jordan,* 190 Ark. 941, 946-7; 82 S. W. (2d) 205.

Heakes v. *Heakes,* 157 Ga. 863, 867-8; 122 S. E. 777.

Simonton v. *Simonton,* 33 Ida. 255, 265; 193 Pac. 386.

Schuler v. *Schuler,* 209 Ill. 522, 527; 71 N. E. 16.

Madison v. *Wedron S. Co.,* 352 Ill. 60; 184 N. E. 901.

Hamlin v. *Race,* 78 Ill. 422.

" 'Cause of action' includes every fact necessary for the plaintiff to prove to entitle him to succeed,—every fact that the defendant would have a right to traverse. It has been said to be the right to prosecute an action with effect. * * * The terms 'right of action' and 'cause of action' are equivalent expres-

sions. * * * 'By this phrase (cause of action) is understood the right to bring an action, which implies that there is some person in existence who can assert and also a person who can lawfully be sued. * * * There is no cause of action till the claimant can legally sue. * * * If he have no legal right to sue, he has not merely a bad cause of action, but no cause of action.' * * * A cause of action accrues when facts exist which authorize one party to maintain an action against another. * * * It is not possible for one at the same time to have a cause of action and not to have the right to sue. The statutory notice is as essential to the plaintiff's cause of action as is a demand in replevin of a defendant whose possession was originally lawful and who has done nothing to make it unlawful."

Walters v. *City*, 240 Ill. 259, 263-4; 88 N. E. 651.

Save for the statutory definition of "accrued" probably none would dispute the applicability of the ordinary rule to war risk insurance installments. For our part we think the definition in question adds nothing to the usual meaning of the word "accrued," but if the homage we are accustomed to pay to the rule of construction which requires us, if possible, to give some special meaning to every word in a statute and to reject nothing as surplusage, forces us to find some special meaning for the words used in the definition which will give the statute a meaning other than what it would have with the definition left out, there will still be no insurmountable obstacle. For we resolve the difficulty thus: Without the definition the cause of action would not accrue until there had been an administrative disagreement, because, until such disagreement, no court would be open for suit, thereby giving the claimant six years from date of disagreement for suit on installments long past due and enabling him to postpone the statutory bar indefinitely

by delay in filing claim with the administrative body charged with passing on it. To prevent such a result Congress defined "accrued" as the happening of the contingency on which the claim is based, thus starting the limitation period running on the due date of the installment and making it impossible for the claimant to delay suit by delay in filing his claim, except for the six-year limitation period, and placing responsibility for any further extension upon the delay of the administrative body in passing on the claim.

Anyway, the rule against treating any words of a statute as surplusage unless it is unavoidable furnishes no help to petitioner, because we are not concerned with the question of giving effect to, or ignoring, any part of the statute, but merely with the meaning of a part of the statute to which we are to give effect. The doctrine in question, relied on by the government in the Court of Appeals, in no way aids it in its contention that a meaning should be given to the words contrary to the meaning generally given to such words when used in a similar connection in other statutes, as, for instance, in the Federal Employer's Liability Act heretofore discussed.

As to the possibility suggested by petitioner (Bf. 26) of a beneficiary bringing suit 26 years after date of total permanent disability, we refuse to be drawn into an argument over a contention which we are not making. We have contended that the happening of the contingency on which the claim of the beneficiary is based which starts the six-year limitation period running on that claim is the death of the insured, and that is the only argument we are making as to the claim of the beneficiary. As that death occurred April 22, 1927, and the suit was filed within the immediately ensuing period of six years, plus the time from February 11, 1932, to August 8, 1935, during which the claim was pending

in the Veterans' Administration, we are not concerned with any question as to whether, under some circumstances, the claim of the beneficiary might not be outlawed until the expiration of 26 years, or any other period not involved in the instant suit. In any event, when petitioner entered into a contract providing for payments extending over a period of twenty years or longer, it should be prepared to defend a suit brought within the statutory limitation period of six years after the due date of the installment demanded and preserve its evidence to meet such a suit. Moreover, it is obvious that if anybody is hurt by the long period to be covered, it is the claimant, who seldom has the means to locate witnesses and produce evidence covering the early part of the period, and not the government with its copious records and its unlimited funds to use in locating witnesses and discovering evidence. The colossus needs no protection against the midget.

As Congress has not taken away any right of the beneficiary under the insurance contract in the instant suit, we fail to see any point to petitioner's argument (Bf. 26-7) that the beneficiary is merely a volunteer whose said rights may be taken from him by Congress and given to others.

In the final analysis petitioner must stand or fall as to the entire case on the decision in *U. S.* v. *Turner*, 77 F. (2d) 423 (CCA 5). That decision ought not to be followed, because it construes a limitation provision strictly in favor of the government, instead of, according to the weight of authority [*U. S.* v. *Lund*, 76 F. (2d) 723, 724-5 (CCA 7); *U. S.* v. *Tyrakowski*, 50 F. (2d) 766, 767 (CCA 7); *Ford* v. *U. S.*, 44 F. (2d) 754, 755 (CCA 1); *U. S.* v. *Cox*, 24 F. (2d) 944 (CCA 5); *McNally* v. *U. S.*, 52 F. (2d) 440 (CCA 8); *U. S.* v. *Phillips*, 44 F. (2d) 689 (CCA 8); *Glazow* v. *U. S.*, 50 F. (2d) 178 (CCA 2);

U. S. v. *Le Page*, 59 F. (2d) 165 (CCA 1); *U. S.* v. *Aetner*, 287 U. S. 470; *White* v. *U. S.*, 270 U. S. 175], liberally in favor of the insured and his beneficiary, and also because it is illogical and based on a wrong theory, in that it assumes that the beneficiary derives any rights he has from the insured and says that to hold that the cause of action of the beneficiary accrued at date of death, instead of at the beginning of total permanent disability, would establish a limitation period for rights accruing to the insured and at the same time leave without any limitation a suit by the beneficiary. Obviously, if the cause of action of the beneficiary accrued at the date of death it would be barred six years after the date of death and would not be left without any limitation. The case has also been receded from as far as necessary to hold the claim not barred in a later case in the same Circuit, and apparently the only reason why it was not overruled altogether was because a decision in favor of the beneficiary in the later case did not so require.

> "* * * nothing in the statutes or decisions lends support to the view that the right of one claimant depends upon, or is affected by, the filing or failure to file claims or suit by another. * * *
>
> Here the fact of the occurrence of total and permanent disability while the policy was in force, if established in a suit timely brought by the representative of the insured and his beneficiary, would have supported a judgment in favor of the former for payments accrued before the insured's death, and one in favor of the latter for payments accruing afterwards. Nothing in the statutes or the decisions lends support to the view that because one of these causes of action was allowed to become barred, the other, though timely filed on, could not be sued. Plaintiff brought her suit in time; neither action nor inaction on the part of the representa-

tive of the insured ought to, nor do we think it could, affect her right to recovery. * * *

The new beneficiary does not take by inheritance from the insured, nor otherwise claim as a successor of his right, but takes directly under the policy, just as the remainderman does not take under the life tenant but under the instrument which created the rights of both. The new beneficiary's right of action is founded upon the policy and not upon the right of the insured to collect installments during his disability until death. * * * He has as beneficiary nothing to do with installments which accrued before death. His independent claim arose and could be enforced only at the insured's death. That limitation may since have run against the insured as to the installments owing to him is unimportant."

Ivy v. *U. S.*, 84 F. (2d) 37, 39, 39-40.

It was contended by petitioner below that the latter paragraph of the foregoing quotation was a portion of a specially concurring, but really dissenting, opinion of Judge Sibley. It was not such in fact, not being one of those decisions where a judge concurs merely in the result, but for an entirely different reason, and dissents from the language and reasoning of the majority opinion, but an examination of both opinions will show that all of the judges were in accord and that Judge Sibley merely wanted to state the matter in language which seemed to him more clear or more emphatic. There is no more reason for calling his concurring opinion a dissenting one than there would be in some of the English cases where each of perhaps five judges writes a separate opinion, in selecting one of them as the opinion of the court and calling all the others dissenting opinions. There is no conflict between the two-judge opinion and the one-judge opinion.

The admission in petitioner's brief (p. 27) that "the

insured may change the beneficiary at any time" is quite significant as an indication of the fallacy of the contention made in the next sub-head of that brief where petitioner argues that when total permanent disability "accrues while the insurance is in force, the insurance itself ceases, since there is substituted for it the matured obligation" to pay benefits, and also the fallacy of a similar argument made later in petitioner's brief (p. 31). If the insurance thus ceases, how is it that the right to change the beneficiary continues? If it so ceases, how is it that, if the disability later on ceases to be total, or ceases entirely, the insured may resume payment of premiums and still have a valid insurance contract which may again ripen into a government obligation to pay disability or death benefits at some time in the future and which will continue in force as originally issued for two years without conversion (W. W. V. Act, Sec. 512, Tit. 38, USCA; see appendix)? What of the express statute that "All yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927" (W. W. V. Act, Sec. 512, Tit. 38, USCA pocket part; see appendix)? No, the theory that when the disability occurs the insurance is at an end will not stand the test of logic.

This also disposes of petitioner's contention that once total permanent disability occurs a single indivisible obligation arises to pay a fixed amount which becomes definitely payable, regardless of the persons between whom it may be apportioned. If an insured recovered a judgment in 1920 for total permanent disability benefits and through discovery of a cure in 1922 for what was formerly thought to be an incurable disease, ceases to be totally and permanently disabled, what becomes of the alleged single indivisible obligation to pay 240 installments? Certainly, if he does not resume payment of

premiums, the insurance will lapse and nothing more will ever become payable. Just as certainly, if he resumes payment of premiums, he will have a contract of insurance in force which is of just as much validity as to him as when it first came into existence,—one under which he will again become entitled to benefits payable throughout his life, be it 20 or 40 years, if he again becomes totally and permanently disabled while it is in force, and under which his beneficiary may or may not be entitled to death benefits, depending on whether the insured lives until maturity of the 240th installment and on whether or not he continues to pay premiums until his second total permanent disability begins. How can it be said that all these various contingent liabilities are not severable obligations but constitute one single indivisible obligation?

Petitioner's contention that there is a parallel between respondent's rights as beneficiary and as administrator ignores the fact that the former accrues to him in his own right and the latter in a representative capacity, in which latter capacity he is barred by anything that would bar the insured whose representative he is.

The conclusion sought to be drawn by petitioner (Bf. 31) from the statutory use of the words "right" and "contingency" in the singular is unsound. It will be noticed that the limitation provision of the statute says "after the right accrued *for which the claim is made.*" (Italics ours.) Far from supporting petitioner's contention, this recognizes that there are many different and distinct rights for which as many separate claims may be made, perhaps a separate one for each installment of insurance benefits, and seems to provide that each shall have its own six-year limitation period.

Petitioner's citation of *U. S.* v. *Boyett*, 92 F. (2d) 438 (Bf. 28) is pointless, as it is not a limitation case.

In its desperation, petitioner resorts (Bf. 33-5) to the argument that because Congress provided that "all persons having or claiming to have an interest in such insurance may be made parties to such suit" when any claimant sues, therefore Congress must have intended total permanent disability, and not death, to be regarded as the contingency and the claim to be a single indivisible one. When it is realized that joinder of a beneficiary, who paid no premiums, is authorized when the administrator of the insured sues, even merely for a return of premiums, all substance, *if any*, to the theory is destroyed.

Petitioner cites (Bf. 35-6) *Tyson* v. *U. S.*, 297 U. S. 121, 123, *Munro* v. *U. S.*, 303 U. S. 36, and many Court of Appeals cases, in support of its contention that until the instant decision it has been uniformly assumed that its theory as to limitations is sound. If that is so, it is only because the question was never raised in any of those cases and a question not raised is not decided. In all of those cases, the controversy concerned the interpretation of the plaintiff's rights under the "one year after July 3, 1930," limitation and no contention was made that the six-year limitation would save some of the installments. What was said in the opinions about the latter was merely by way of recital of the words of the statute. For instance, in *Tyson* v. *U. S.*, 297 U. S. 121, 123, the words which petitioner omits from its quotation are "or within one year after July 3, 1930," and the decision, as well as the only point argued, as an examination of the briefs will show, was that where claim was filed July 3, 1931, the suspension of the one-year limitation would expire on the very day of decision. Likewise, in *Munro* v. *U. S.*, 303 U. S. 36, the only point raised or decided was merely that mere service of summons, without service of complaint, would not toll the statute

and the decision was so limited for the reason that, as the opinion recites (p. 39), "by concession it was necessary to bring suit not later than July 1, 1933."

In support of its argument for strict construction of the limitation provision as applied to waiver of sovereign immunity to suit, petitioner ignores the cases heretofore cited (p. 13) announcing the rule supported by the weight of authority and cites cases not in point at all, or else those adhering to the minority rule (Bf. 37). To this end petitioner cites *Kemp* v. *U. S.*, 77 F.(2d) 213 (CCA 7), and raises the implication that the latter overrules *U. S.* v. *Lund*, 76 F.(2d) 723 (CCA 7). Of course, the court had no such intention, for the *Lund* case was not even mentioned in the *Kemp* case, either in any brief or in the opinion. The *Kemp* case had nothing whatever to do with the question involved in the instant case as to when an action shall be deemed to have accrued, but decided, first, that there was no jurisdictional disagreement because no insurance claim had ever been filed, and second, that if it had been filed the first suit was commenced before there was any disagreement and was dismissed *voluntarily* by the plaintiff, instead of for failure of process, and the second suit was commenced, admittedly, after the statutory limitation period had expired and it was sought to avoid the bar of the limitation under the statute giving an additional year after dismissal to institute suit where a suit seasonably instituted had failed through defect of process or similar circumstances not affecting the merits. All that the court decided was that a *voluntary* nonsuit does not give the right to institute a new suit within the year,—a decision in accord with the universal rulings of all courts, state and federal, construing similar nonsuit provisions. What was said about construing statutes strictly which relax sovereign immunity from suit, was

evidently intended to apply to the institution of a war risk insurance suit without a previous claim or disagreement, or perhaps to the filing of a second suit solely because of dismissal of the first suit, and there was no intention of overruling the *Lund* case or adopting any rule of strict construction of limitation provisions against plaintiffs in war risk insurance suits. The cases cited in the *Kemp* decision were not war risk insurance suits, but *U. S.* v. *Michel*, 282 U. S. 656, was an income tax refund case brought by a living taxpayer after the limitation period had run; *Eastern T. Co.* v. *U. S.*, 272 U. S. 675, was an admiralty suit where Congress authorized suit against the United States where a private ship owner could have been sued under similar circumstances, and had nothing to do with limitations; *Price* v. *U. S.*, 174 U. S. 373, had nothing to do with limitations, but held the statute authorizing suit against the United States on account of property taken or destroyed by Indians did not authorize suit for mere consequential damages resulting to the owner of property so taken, but not directly caused by the Indians, where the loss of the oxen taken made it necessary to sell the property not taken at a low price because there was no other means of transporting it to market. *Schillinger* v. *U. S.*, 155 U. S. 163, was not a limitation case, but merely holds that in authorizing suit against the United States on contract obligations Congress did not authorize suit for a tort.

The other cases cited by petitioner (Bf. 37) on the strict construction doctrine are inapplicable to the question involved in the instant case and are by courts adhering to the strict construction doctrine in war risk insurance suits. Furthermore, in *U. S.* v. *Valdez*, 81 F. (2d) 615, 617, the real point was as to the necessity of pleading the statutory limitation. *U. S.* v. *Arditto*,

86 F. (2d) 787, 788, decided merely that where a claim had been filed and denied before the effective date of the amendatory Act of July 3, 1930, the limitation period established by that Act was not to be extended for a period equivalent to the time of such pendency of the claim in the Veterans' Bureau. *Fletcher* v. *U. S.*, 92 F. (2d) 713, 717, was not a war risk insurance suit at all, nor applicable to the instant case, and even at that did not announce a universal rule of strict construction of statutes giving a right to sue the United States, but merely held that "generally" they were to be construed strictly.

(*b*) The same general principles should be applied to the claim of the administrator. No right of action accrued to anybody as to any particular installment until the due date of that installment. On February 11, 1932, when the administrator filed his claim for the installments of total permanent disability benefits which became due each month up to the date of death, the six-year limitation period had not run on any monthly installment which became due on or after February 11, 1926, and therefore the administrator had an enforceable claim which had not been barred. It would seem that as to the claim of an insured for total permanent disability benefits, the happening of the contingency on which the claim for each installment is based ought to be considered the maturity of that particular installment; otherwise, the claim of an insured for any installment maturing after July 3, 1931, and more than six years after the beginning of total permanent disability would be barred, even though a claim for total permanent disability benefits had been made and allowed in January, 1925, and all installments maturing on or before July 3, 1931, and within six years from the beginning of total permanent disability had been paid and

the government had not claimed there was any cessation of the total permanent disability nor refused to pay further installments until after the expiration of that time. Under such circumstances, according to the government's theory, the claim of the insured for such later installments would be barred and so would that of his administrator. That would also be an absurd and illogical result and it seems impossible that any theory of law which would bring it about can be sound.

Our theory does not free a claim for total permanent disability benefits from all limitations, for each installment is barred in six years after its maturity. The fact, *if it be such*, that petitioner had adopted *and will continue* a policy of waiving the limitation bar when judgment has been rendered for installments maturing later, has no bearing on the question under consideration. The court determines the *rights* of petitioner and does not undertake to direct its policy in dispensing gratuities.

Petitioner cites (Bf. 22) *U. S.* v. *Sligh*, 24 F. (2d) 636 (CCA 9), but it is interesting to note that in that case all installments maturing late enough to avoid the limitation bar were paid before suit and the suit was concerned only with an attempt to recover those barred by the state statute which then governed in the absence of any federal limitation.

We refuse to be drawn into any argument that our theory would permit a living insured to bring suit at any time, for that is not our case and we make no such contention. Sec. 451, Tit. 38, USCA (see appendix) does not apply to a living insured, but creates a right in the administrator only and a single right, not a continuing one.

II.

While of no particular importance in the computation f time here involved, yet the footnote statement in petitioner's brief (p. 38), to the effect that Sec. 445d, Tit. 8, USC, did not add 90 days to the period of suspension ut merely provided that the claimant should be allowed period of at least 90 days from the date of the mailing f the notice of denial of his claim, within which to bring uit, is unsound. The very statutory provision cited expressly refutes this contention of petitioner by the opening words of the following quotation:

> "In addition to the suspension of the limitation for the period elapsing between the filing in the Veterans' Administration of the claim under a contract of insurance and the denial thereof by the Administrator of Veterans' Affairs or someone acting in his name, the claimant shall have 90 days from the date of the mailing of notice of such denial within which to file suit. * * *"
>
> Sec. 445d, Tit. 38, USCA, 1938 Pocket Supp., p. 135.

Neither does *U. S.* v. *Pastell,* 91 F. (2d) 575, support etitioner's contention, but in stating that said section ntended the claimant should have "at least 90 days," he court did not mean that the 90 days should not be dded to the suspension period.

The claim sued on was filed February 11, 1932, denied ugust 8, 1935, and suit instituted June 29, 1936. The ix-year limitation period was therefore suspended or xtended for as long a time as there was between Febuary 11, 1932, and August 8, 1935, plus 90 days under he statute cited, or 3 years, 5 months and 28 days, plus 0 days, thus establishing a period of at least 9 years,

8 months and 26 days immediately prior to June 29, 1936, during which the maturing installments were not barred. In other words, the administrator has a right to recover all installments falling due on or after October 3, 1926, and before April 22, 1927. It is true that this gives the administrator a very few less installments than the computation in the Court of Appeals opinion, but that has no bearing on the propriety of the reversal of the District Court, for the District Court rejected the claim *in toto* and a reversal was called for if any installment could be recovered.

CONCLUSION.

That the judgment of the Circuit Court of Appeals ought to be affirmed is

Respectfully submitted,

EDWARD H. S. MARTIN,
PHILLIP B. LEVITON,
Attorneys for Respondent.

APPENDIX.

World War Veterans' Act, Sec. 451, Tit. 38, USCA, Pocket Part p. 139; Sec. 26, 43 Stat. 614; as amended July 2, 1926, c. 723, Sec. 3, 44 Stat. 792; July 3, 1930, c. 863, Sec. 2, 46 Stat. 1016:

"The amount of the monthly installments of compensation, yearly renewable term insurance, or accrued maintenance and support allowance which has become payable under the provision of Parts II, III, or IV of this chapter, but which has not been paid prior to the death of the person entitled to receive the same, may be payable to the personal representatives of such person, * * *."

World War Veterans' Act, Sec. 512, Tit. 38, USCA, Pocket part pp. 189, 190, June 7, 1924, c. 320, Sec. 301, 43 Stat. 624; March 4, 1925, c. 553, Sec. 13, 43 Stat. 1309; as amended June 2, 1926, c. 449, 44 Stat. 686; May 29, 1928, c. 875, Sec. 14, 45 Stat. 968; July 3, 1930, c. 849, Sec. 22, 46 Stat. 1001; July 3, 1930, c. 863, Secs. 1, 2, 46 Stat. 1016; June 24, 1932, c. 276, 47 Stat. 334; June 1, 1937, c. 285, 50 Stat. 241:

"* * * All yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927: * * *

In case where an insured whose yearly renewable term insurance has matured by reason of total permanent disability is found and declared to be no longer permanently and totally disabled, and where the insured is required under regulations to renew payment of premiums on said term insurance, and where this contingency is extended beyond the period during which said yearly renewable

term insurance otherwise must be converted, there shall be given such insured an additional period of two years from the date on which he is required to renew payment of premiums in which to reinstate or convert said term insurance as hereinbefore provided:" * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938

No. 360

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

CHARLES F. TOWERY IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF ROBERT C. TOWERY, DECEASED,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S PETITION FOR REHEARING.

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RESPONDENT'S PETITION FOR REHEARING

To the Supreme Court of the United States:

Now comes the above named respondent and presents this, his petition for rehearing of the above entitled cause, and in support thereof respectfully shows:

I.

In the last paragraph of the opinion, the answer made by the court to the second objection of respondent to the

court's construction of the section in question overlooks and misapprehends certain features of the right created when the government stops payment of insurance benefits, which deserve further consideration. The objection is that where such termination of payments is based on a government contention that total disability has ceased more than six years after the beginning of such disability and more than six years after the period for which payments have been made, a veteran who contends that total disability has not ceased and that he is entitled to have payments continue *in the full original amount*, would be barred from recovery of the full amount because of the expiration of the six years. The court's answer is that upon such stoppage of payment the policy is automatically reinstated *for a reduced sum* and that he would have full six years thereafter in which to litigate the claim, since he would thus have been totally and permanently disabled when the policy was in force. Obviously, a right to recover *a reduced amount* would not do justice to a veteran entitled to a larger sum. The insurance might thus have been reduced to a very small amount or wiped out altogether, according to the number of installments that had been paid. If two hundred and forty installments had been paid there would be no insurance left to be automatically reinstated, and the court's answer that the veteran would have the full six years after payment stopped in which to litigate his claim, because through automatic reinstatement the policy would have been in force at the stop payment date, fails, and such veteran, under the court's construction, *although his total permanent disability had actually never ceased*, would be barred and wholly without remedy. Our objection, therefore, remains unanswered and unanswerable.

II.

If the opinion means that such automatic reinstatement would give the veteran six years in which to sue for insurance benefits on the reduced amount in case he should again become totally and permanently disabled after such reinstatement, that would be no adequate substitute for the right of the veteran whose total permanent disability had never ceased to be paid benefits on the full original amount. If it means that he could, within six years after such automatic reinstatement, sue for installments of the full original amount because total permanent disability existed at the time of such automatic reinstatement, although it began more than six years previously, while his insurance was originally in force, this latter meaning ignores the construction in the previous part of the opinion that the six-year limitation period begins to run from the *beginning* of total permanent disability, and really supports the contention of the Court of Appeals and respondent that the date of beginning of total permanent disability has no essential significance with respect to the six-year limitation period.

III.

The decision vitally affects the plaintiffs in a number of suits now pending, whose insurance payments have been stopped under the claim that their total disability has ceased and who are suing to recover monthly installments in the full original amount subsequent to such stoppage, and it will vitally affect the claims of many others who will find themselves in the same predicament, because this decision will encourage the government to stop payment and to contend that in such cases, where

payments have continued for more than six years, the only right of the veteran is to recover installments of a reduced amount.

IV.

The reference in the opinion to the statement in *U. S. v. Worley*, 281 U. S. 239, 341, that when once a right to recover is established by judgment the Veterans Bureau will pay installments maturing after the commencement of the action, is no answer at all to our objection. It is not a ruling that such payment is compulsory, but leaves it open to the government to cease such payments under claim, which may be only pretense, that total disability has ceased. There actually are such cases. (See *Kontovich* v. *U. S.*, 99 F. (2d) 661, 663, 665; *Egan* v. *U. S.*, 80 F. (2d) 404; *Smith* v. *U. S.*, 56 F. (2d) 636, 638; *Spanner* v. *U. S.*, 19 F. Supp. 465.)

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, affirmed.

Respectfully submitted,

Edward H. S. Martin

EDWARD H. S. MARTIN,
PHILLIP B. LEVITON,
Attorneys for Respondent.

I, Edward H. S. Martin, counsel for the above named Charles F. Towery, respondent, DO HEREBY CERTIFY that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Edward H. S. Martin

EDWARD H. S. MARTIN,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 360.—October Term, 1938.

The United States of America, Petitioner, vs. Charles F. Towery, in his own right and as Administrator of the Estate of Robert C. Towery, Deceased.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 27, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

This case turns upon the proper construction of the limitation provision of Section 19 of the World War Veterans Act of 1924, as amended.[1]

The respondent brought an action in the District Court for Northern Illinois in his own right and as administrator of Robert C. Towery, deceased, upon claims on two war risk insurance term policies issued to the decedent while in the military service of the United States. The claim of respondent as administrator was for total permanent disability benefits alleged to have accrued to the insured in his lifetime, and the claim as beneficiary designated in the policies was based upon the death of the insured. The complaint alleged that the premiums were deducted from the insured's pay during his military service, from which he was discharged June 18, 1919; that he became totally and permanently disabled, while the policies were in force, on June 18, 1919; that he died April 22, 1927; that, on May 2, 1927, respondent was appointed administrator; that, on February 11, 1932, respondent made claim for disability and death benefits under the policies; that the claim was denied by the Veterans Administration August 8, 1935. Suit was instituted June 29, 1936. The government moved to dismiss on the ground that the action was barred by limitation. The District Court granted the motion and gave judgment for the

[1] Act of June 7, 1924, c. 320, Section 19, 43 Stat. 612, as amended by Act of July 3, 1930, c. 849, 46 Stat. 992; U. S. C. Tit. 38, § 445.

government. On appeal the Circuit Court of Appeals reversed.[2] We granted certiorari because of alleged conflict of decision.[3]

Section 19 provides that, in the event of a disagreement between the veteran and the Bureau as to a claim under a policy, the claimant may bring an action in the District Court to obtain a decision of the controversy. The statute then proceeds:

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, . . . *Provided*, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further*, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director." . . .

The Circuit Court of Appeals held that the "contingency", on the happening of which "the right accrued for which the claim is made", is not defined by the statute and must be ascertained from the policy provisions. In the light of these provisions the court held that, in the case of a claim for benefits payable to the insured, the contingency is the accrual of an installment and, in the case of a claim by a beneficiary, the contingency is the death of the insured.

The policy, while for a stated amount, calls for payment in monthly installments, two hundred and forty of which (interest being calculated at three and one-half per cent.) would equal the principal sum. Contrary to the view of the court below, disability benefits to the insured do not cease at the expiration of two hundred and forty months but are continued for life if the disability so long lasts.[4] Should the insured die, however, prior to the payment of two hundred and forty installments, further installments up to the limit of two hundred and forty are payable to his beneficiary. Should the beneficiary die before the receipt of all the remaining installments up to two hundred and forty, the commuted

[2] 97 F. (2d) 906.

[3] See United States v. Tarrer, 77 F. (2d) 423.

[4] Act of Oct. 6, 1917, c. 105, Sec. 402, 40 Stat. 398, 409. Bulletin No. 3 Treasury Department, October 16, 1917. Regulations and Procedure U. S. Veterans Bureau 1930, Part II, pp. 1241, 1258, 1259.

value of the unpaid installments is payable to the estate of the insured in one sum.[5] The court below reached its conclusion as to the meaning of the Act, first, by examination of the phrase "within six years after the right accrued for which the claim is made." In the view that, in case of the death of the insured, the beneficiary has a "right" for which a claim may be made and that, prior to the death of the insured, the latter also has a "right", namely, to receive each monthly benefit installment, the court concluded that there were two rights. If this be the correct view there is still a third "right",—that of the administrator of the insured to claim a lump sum commuted value for installments unpaid to the beneficiary at the date of the latter's death. The court then addressed itself to the meaning of the word "contingency" in the first proviso of the section: "it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded." The court held that, in the case of a disabled veteran, at least two contingencies must occur before the right to any monthly benefit accrued,—namely, the occurrence of permanent disability while the policy was in force and the existence of the disability at the date for which a particular monthly payment is claimed. In the case of a beneficiary, the court was of opinion that another contingency must be added, namely, the death of the insured. It made the choice from these possible alternatives by holding that the right accrued in the case of a living insured on the date when each monthly benefit payment became due and, in the case of a beneficiary, when the insured died. This construction is said to comport with the liberal policy of Congress towards veterans and to be supported by the fact that an alternative period of one year from the date of the passage of the statute was accorded by Congress. The court viewed the six year period as a liberalizing alternative to the one year period, and, therefore, held the claim of the respondent, as beneficiary, was timely because suit had been instituted within the six year period as enlarged by the duration of the Veterans Administration's consideration. The claim, as administrator, for installments accruing in the life of the insured, was held maintainable for such installments as accrued due within six years (plus the additional time allowed for administrative consideration)

[5] World War Veterans Act, 1924, as amended, U. S. C. Tit. 38, § 514; McCullough v. Smith, 293 U. S. 228.

prior to the institution of suit. We are unable to adopt this construction of the statute.

Section 19 plainly intends to put a time limitation upon the institution of suit, whereas, the decision of the court below would provide no such limitation upon suits by veterans for total permanent disability benefits, but simply a limitation on the number of installments recoverable; and, in application to disability cases, would preclude only a recovery of certain installments whereas new suits might be brought thereafter by veterans, if living, in cases in which prior suits had been held barred.

We think the legislation and the policy do not confer two rights. The beneficiary's interest in the policy is derivative from that of the veteran. It may be taken away by legislation, even after the death of the insured.[6] There are different events upon the happening of which the payment of benefits to the veteran or to his beneficiaries or to his estate depend. We think it highly unlikely that Congress intended to accord each of the claimants of possible benefits under the policy six years from the time any installment or lump sum payment fell due within which to bring suit.

Millions of veterans allowed their yearly convertible term insurance to lapse when they left the Service.[7] Congress provided that if, at the time of the lapse, the veteran was totally and permanently disabled he might recover notwithstanding he had not made immediate and timely claim. Section 19 of the Act of 1930 was an amendment of an earlier act. The statute was undoubtedly intended as one of repose. The purpose of its adoption, as shown by the Committee Reports,[8] was to substitute a uniform rule of limitation for suits on contracts of insurance in lieu of the state statutes, which, pursuant to the Conformity Act, had theretofore been applied. These varied as respects the period prescribed from three to twenty years. As the reports show, the additional year from the date of the passage of the Act was granted to prevent the hardship of cutting off claims which would have been barred by the six year limitation at the date of the Act. A reading of the section as a whole is persuasive that what Congress intended by "the contingency upon which the claim is founded" was the

[6] White v. United States, 270 U. S. 175.

[7] Lynch v. United States, 292 U. S. 571, 576.

[8] House Committee Report No. 1274, 70th Congress, First Session, p. 1. Senate Committee Report No. 1297, 70th Congress, First Session, p. 1.

contingency on which liability under the policy was bottomed, namely,—permanent disability or death while the policy remained in force.

The construction adopted by the court below would permit the bringing of suits even twenty years after the disability occurred. It is obvious that each year ascertainment of the essential facts which conditioned liability would become more difficult. We think then that, reasonably construed, the section provides that there shall be but one right,—that is, the right to benefit payments, and but one critical contingency which conditions that right, namely, the occurrence of permanent total disability or death while the policy remains in force.

All the other contingencies referred to by the court below, which condition actual payment of the benefits to one person or another, are of minor importance. They are not matters with respect to which disagreement with the Veterans Administration is likely.

Two objections are raised by the respondent to this construction of the section. First, it is said that if suit is brought on a policy and judgment recovered that judgment is only for the installments which have theretofore fallen due and that if the government should fail to pay subsequently accruing installments these might, under our ruling, be barred by the six year limitation. We have said:[9] "Undoubtedly, when once a right to recover is established by judgment, the Veterans Bureau will pay him installments maturing in his favor after the commencement of the action." This has been the consistent administrative practice. Indeed the Bureau has treated a judgment for installments due the veteran as requiring, without further claim, the payment of remaining installments due the beneficiary after his death.[10] The other objection is that, as benefit payments cease on the cessation of the disability, the Veterans Administration may refuse further payments on that ground and, if the insured disagrees with the Bureau's ruling, a suit to test its validity may be barred. The answer is that, under the policy's terms and the administrative rulings, the policy is automatically reinstated for a reduced sum after taking account of the prior payment of benefits and may be continued in force by

[9] United States v. Worley, 281 U. S. 339, 341.

[10] Letter of Solicitor of Veterans Administration, February 8, 1938.

the insured by the payment of future premiums.[11] If he contends that when the policy is thus reinstated he is still permanently and totally disabled, he has the full six years granted by the statute in which to litigate the claim since, if he can establish his contention, he would have been totally and permanently disabled at a time when the policy was in force.

The judgment is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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11 Veterans Administration Regulations R. 3141-3143.